ORIGINAL

No. _____

4-LD

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

In re Daniel Choi,

Petitioner

ON PETITION FOR A WRIT OF MANDAMUS/PROHIBITION TO
THE HONORABLE ROYCE C. LAMBERTH

(Criminal Case No. 10-739-11, The Honorable John M. Facciola, Presiding)

PETITION FOR A WRIT OF MANDAMUS/PROHIBITION

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RELIEF SOUGHT

Lt. Daniel Choi respectfully petitions this Court for a writ of mandamus and/or prohibition to the Honorable Royce C. Lamberth, Chief Judge, United States District Court for the District of Columbia, 1) commanding him to vacate his October 11, 2011 Memorandum Opinion and Order in criminal case United States v. Daniel Choi, No. 10-739-11, that granted the Government's "Petition for Writ of Mandamus" and that issued a writ of mandamus to the Honorable John M. Facciola, Magistrate Judge, United States District Court for the District of Columbia; and 2) commanding him to dismiss the Government's "Petition for Writ of Mandamus" for lack of jurisdiction, or to deny it for failing the mandamus standard.

ISSUES PRESENTED

Whether Judge Lamberth clearly erred, and/or abused his discretion and irreparably harmed Lt. Choi, in hearing and granting the Government's "Petition for Writ of Mandamus" and in issuing a writ of mandamus to Judge Facciola.

Whether a District Court judge has jurisdiction to hear and grant a petition for a writ of mandamus and to issue a writ of mandamus against a judge of the same District Court.

Whether a selective/vindictive-prosecution defense may be raised by a defendant or a District Court judge sua sponte at trial in a bench trial when 1) the defendant has raised the defense pretrial; 2) the judge in his discretion has specifically deferred the matter of that defense until trial; 3) the Government has not timely objected to/appealed that deferral, and in fact has exploited that deferral by asking questions at trial specifically designed to rebut that defense; and 4) new evidence, of which the defendant could not have reasonably known before trial and which puts the quantum of evidence past the threshold for a prima facie case of the defense, first comes out during trial.

FACTS

The United States Government charged West Point graduate, Arabic linguist, former army officer, combat veteran and civil rights leader, Lt. Daniel Choi in the United States District Court for the District of Columbia with a federal misdemeanor—failure to obey a lawful order—in connection with a November 15, 2010 protest against "Don't Ask, Don't Tell" in front of the White House. The Honorable John M. Facciola, Magistrate Judge, was assigned to conduct the trial of the criminal case, pursuant to 18 U.S.C. § 3401(a).

Judge Facciola held a hearing in the case on March 18, 2011. During that hearing, he specifically remarked on the unusually heightened federal charge versus a municipal charge for a peaceful protest. Further, he cited the possible

analogy of Shuttlesworth v. Birmingham, 394 U.S. 147 (1969), a watershed selective-prosecution case. See 3/18/11 Tr. passim and at 9-19, 28. Lt. Choi's then-lead-counsel, Mark Goldstone—who for years has regularly represented individuals charged in connection with White House protests—concurred, indicating that the Government was treating Lt. Choi differently from its normal charging-practice, including, importantly, with respect to Lt. Choi's own previous two arrests for peacefully protesting in front of the White House when the Government charged him municipally.[1]

Ultimately, the case was set for a final pretrial hearing before Judge Facciola on August 25, 2011, and then a bench trial before him on August 29, 2011.

On August 24, 2011, in a pre-final-pretrial-hearing phone call between Lt. Choi's new-lead-counsel, Robert J. Feldman, and the Government prosecutor, Assistant United States Attorney Angela George, Attorney Feldman specifically informed AUSA George that Lt. Choi "would be claiming that the government selectively prosecuted [Lt. Choi] because of his sexual orientation and his Anti-Obama perspective." Government "Petition for Writ of Mandamus" at 11.

[1] But later dropped the charges.

On August 25, 2011, in the final pretrial-hearing before Judge Facciola at which Attorney Feldman and AUSA George were present, Attorney Feldman asked Judge Facciola to take judicial notice of photographs of the Osama bin Laden death rally in front of the White House—showing crowds in front of the White House supportive of Obama and violating federal regulations and municipal laws but not being arrested—which Attorney Feldman had said went to selective prosecution. Judge Facciola did so take notice. See 8/25/11 Tr. passim. "Later during the status hearing, when the government returned to the selective-prosecution issue, inquiring whether the parties would litigate it, the USMJ stated 'I will hear, at the conclusion of the case, any legal arguments anyone wishes to make; one of which I take it will be that in prosecuting Mr. Choi but not prosecuting these demonstrators [depicted in the photographs], the government is engaging in selective prosecution in violation of the Fifth Amendment.'" Government "Petition for Writ of Mandamus" at 12 (partially quoting 8/25/11 Tr. at 10-11).

Judge Facciola conducted the August 25, 2011 pretrial hearing by telephone, because Attorney Feldman was at the time in New York where he resides, as does Lt. Choi. In fact, the rest of Lt. Choi's defense team reside or live several hours' travel from D.C. as well—two others in New York, one in Florida, and one in Ohio.

On Sunday, August 28, 2011, at about 11:00 p.m.—that is, approximately ten hours before the bench trial was to begin—AUSA George filed a motion in limine, asking Judge Facciola to prevent Lt. Choi from raising or pursuing a selective-prosecution defense at trial. When trial began at around 9:30 a.m. the next day, Monday, August 29, 2011, AUSA George asked Judge Facciola to rule on her just-filed motion in limine. Indicating he had barely had time to read AUSA George's motion that morning, Judge Facciola deferred resolution of it until after Lt. Choi had put on his defense—in effect, reiterating his (Judge Facciola's) decision during the August 25, 2011 hearing to defer the matter of the defense until both sides had presented their case at trial.

Three days of bench trial then ensued. During the first day and following, evidence—including from the Government's own witnesses on its case in chief—was introduced showing that the Government had selectively and/or vindictively prosecuted Lt. Choi based on his sexual orientation and his criticism of President Obama for discrimination against gay Americans. See 8/29-31/11 Tr. passim. The most damning of this evidence was evidence that the Government had withheld from Lt. Choi despite his pretrial May 2, 2011 discovery request, and that Lt. Choi could not have known about without Government disclosure because it was within the Government's peculiar knowledge. This damning evidence—including internal Government email, an internal Government memorandum, and internal

Government oral communications—indicated that the Government had learned of Lt. Choi's protest beforehand, apparently through illegal surveillance of him and other peaceful activists; that even before Lt. Choi's protest took place, the Government conspired to charge him federally; and that the Government knew that the federal charge which it eventually brought against Lt. Choi was a baseless one to begin with given the facts of the case.

During this same first day of trial, including on the Government's case in chief, and subsequently, AUSA George repeatedly—in an attempt to preempt a selective-prosecution defense by Lt. Choi—asked Government witnesses what their motive was in arresting Lt. Choi, and they answered.

Pursuant to the shocking Government disclosures on the first day of trial, Lt. Choi's defense counsel, before trial resumed on the morning of the second day, swiftly subpoenaed the Park Police and Secret Service for documents and testimony relevant to the disclosures, with production in court for that afternoon. By the end of the second day, however, the Government had neither responded to the subpoenas, nor moved Judge Facciola to quash them. Therefore, the evening of the second day, Lt. Choi's defense counsel filed a motion to compel.

Also during the second day of trial, Lt. Choi took the stand on his behalf, and testified, among other things, that he was being selectively and vindictively prosecuted by the Government, and the factual bases for that belief.

On the morning of the third day of trial, Lt. Choi's co-defense counsel, Attorney Norman Kent, raised Lt. Choi's pending motion to compel with Judge Facciola, and orally argued that Lt. Choi was entitled to selective-prosecution discovery because the evidence adduced at trial thus far showed selective prosecution. See 8/31/11 a.m. Tr. at 3-8. Judge Facciola agreed with defense counsel, ruling that Lt. Choi had made out a prima facie case of selective/vindictive prosecution, and that Judge Facciola thus would allow both Lt. Choi and the Government discovery relevant to that defense, with the Government allowed to raise any applicable legal privileges. See 8/31/11 a.m. Tr. at 5, 8, 71.

AUSA George objected to Judge Facciola's decision, arguing that because trial had already begun, a selective/vindictive-prosecution defense was totally prohibited. Judge Facciola then—over Lt. Choi's objections including under FRCrP 48(b)(3)—decided to suspend the trial to give the Government 10 days to seek mandamus from *this Court*—that is, the D.C. Circuit Court of Appeals—to challenge Judge Facciola's decision. See 8/31/11 p.m. Tr. at 13, 15, 24.

However, instead of filing an original mandamus action in this Court or in the District Court, or appealing Judge Facciola's decision to the District Court, the Government *within the extant criminal case against Lt. Choi—No. 10-739-11—* filed a "Petition for Writ of Mandamus" (Exhibit D hereto), seeking mandamus to prohibit Judge Facciola from allowing Lt. Choi to pursue the selective/vindictive-

prosecution defense at trial. The Honorable Royce C. Lamberth, Chief Judge of the District Court, sua sponte decided to hear the "Petition."

Lt. Choi filed a Response (Exhibit E hereto) to the Government's "Petition," arguing, among other things, that there was no jurisdiction for such a "Petition," and that the Government in any case was not entitled to mandamus. Specifically as to the lack-of-jurisdiction issue, Lt. Choi argued that mandamus did not lie from one District Court judge to another (from Judge Lamberth to Judge Facciola), including under 28 U.S.C. § 1361 because that section applies only to Executive branch officials and Judge Facciola is not an Executive official, and it did not lie under 28 U.S.C. § 1651, the All Writs Act, because that section involves a federal appellate court acting on an inferior court, and Judge Lamberth is not an appellate court. Further, Lt. Choi argued, the All Writs Act—on which the Government specifically relied in its "Petition"—states that "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law," and under FRCP 81(b), "The writs of scire facias and mandamus are abolished" in District Court practice. Lt. Choi also argued that no court has apparently ever held that the All Writs Act applies at the District Court level between judges. Lt. Choi also argued that there is no procedure for mandamus in the Federal Rules of Civil/Criminal Procedure but there is in the Federal Rules of Appellate Procedure

and in the Supreme Court Rules—to whose corresponding courts the All Writs Act has traditionally been limited—and that Judge Facciola had expressly suspended the criminal case so that the Government could seek mandamus in this Court (the D.C. Circuit)—both further evidence that there is no All Writs Act mandamus at the District Court level.

On October 11, 2011, Judge Lamberth ruled on the Government's "Petition." See Oct. 11, 2011 Memo. Op. (Exhibit A hereto). Judge Lamberth acknowledged the lack of any reported case of mandamus from one District Court judge to another. See id. at 4. He acknowledged that Section 1361 mandamus applies only to Executive branch officials and therefore not to Judge Facciola. See id. at 4-5. He acknowledged that the Federal Rules of Civil/Criminal Procedure do not explicitly provide for mandamus whereas the Federal Rules of Appellate Procedure and the Supreme Court Rules do, and that in fact FRCP 81(b) expressly "long ago abolished the writ of mandamus in the district courts (although not in the appellate courts)." See id. at 6, citing In re Cheney, 406 F.3d 723, 729 (D.C. Cir. 2005) (en banc). Judge Lamberth acknowledged that normally a District Court judge does not stand in an appellate-court relationship to a magistrate judge. See Memo. Op. at 7. Judge Lamberth further acknowledged, see id. at 6, a federal case, Fabuluje v. Barefoot Sanders, U.S. District Judge, 2001 U.S. Dist. LEXIS 13231 (N.D.Tex. June 20, 2001), in which the court ruled that a District Court

judge lacks the jurisdiction to issue mandamus to another judge of the same District Court, see id. at * 4 ("The structure of the federal courts does not allow one judge of a district court to rule directly on the legality of another district court judge's judicial acts or to deny another district judge his or her jurisdiction.***When a cause is pending before a particular judge of a district court, that judge has the exclusive jurisdiction over the matter that is pending.***Moreover, as a matter of comity, if not jurisdiction, [a court] should decline to interfere in a proceeding pending before another judge.").

Judge Lamberth even acknowledged that given the lack of precedent for District Court mandamus jurisdiction under Section 1651, he was "wary of finding the existence of such jurisdiction"—especially with "the D.C. Circuit's indication in *Cheney* that district courts' authority to issue writs of mandamus under the All Writs Act has been abrogated[.]" Memo. Op. at 9.

Nevertheless, Judge Lamberth ruled that "the All Writs Act permits district courts to issue writs of mandamus to magistrate judges" in "misdemeanor cases . . . where the magistrate judge exercises full authority over the trial, subject to review of the district court only insofar as a circuit court of appeals could exercise review over a district court trial." Id. at 10. He cited in support of his appellate-nature analogy a single foreign case, In re Calore Express Co., 266 B.R. 727, 733 (D.

Mass 1998), in which a District Court judge issued mandamus to a Bankruptcy Court judge.

Finding jurisdiction for himself to issue mandamus to Judge Facciola, Judge Lamberth then found that the Government satisfied the elements for mandamus. He found that the Government had no other adequate means of review besides mandamus. He found that if, after allowing Lt. Choi to pursue selective/vindictive prosecution as a defense at trial, Judge Facciola then *acquitted* Lt. Choi on selective/vindictive-prosecution grounds, the Government would have no appeal, because the Government may not appeal an acquittal under the double-jeopardy doctrine. See Memo. Op. at 11. Further, Judge Lamberth found that if, after allowing Lt. Choi to pursue selective/vindictive prosecution as a defense at trial, Judge Facciola then *dismissed* the charge on selective/vindictive-prosecution grounds rather than acquitted Lt. Choi of it on those same grounds, the Government would have no appeal, because the Government may not appeal a dismissal "when the defendant does not consent to the dismissal." Id. at 12. Judge Lamberth indicated that at oral argument on the Government's "Petition," Lt. Choi's defense counsel indicated that he "would not consent to a dismissal." Ibid.

Judge Lamberth did, however, admit that if, after allowing Lt. Choi to pursue selective/vindictive prosecution as a defense at trial, Judge Facciola then *dismissed* the charge on selective/vindictive-prosecution grounds *with Lt. Choi's*

consent, the Government in fact would have an appeal, because Judge Facciola's dismissal would be a legal ruling not on the merits that the Government could appeal without violating double jeopardy. Id. at 12-13. However, citing Banks v. Office of the Senate Sergeant-at-Arms, 471 F.3d 1341, 1350 (D.C. Cir. 2006), Judge Lamberth then said that even in that situation mandamus was warranted because "the requirement that there be no adequate means of review may be waived if the petitioner will suffer irreparable harm," and the Government in its "Petition" alleged that "it would incur significant expense in conducting [its own] discovery, and responding to discovery requests [from Lt. Choi], regarding a selective or vindictive prosecution claim." Ibid.

As to the mandamus element of a clear and indisputable right to relief, Judge Lamberth found that Judge Facciola had a clear duty not to acquit Lt. Choi on selective/vindictive-prosecution grounds, because acquittal is by law not a remedy available for selective/vindictive prosecution—dismissal is; or, to put it another way, selective/vindictive prosecution is not a defense on the merits but a procedural defense. See id. at 13-14. Nor as a matter of law, Judge Lamberth found, could Judge Facciola at trial procedurally dismiss—sua sponte or upon Lt. Choi's motion—the charge on selective/vindictive-prosecution grounds, because a prerequisite for such dismissal is a defendant's pretrial *motion*, and Lt. Choi had not made such a motion. Moreover, Judge Lamberth ruled, while "Judge Facciola

would . . . have the authority to permit a mid-trial motion to dismiss the prosecution on the basis of selective or vindictive prosecution were he to determine that good cause for the delay [in bringing the motion pretrial] existed[,]" Judge Lamberth "[saw] absolutely no basis in the record for a finding of good cause." Id. at 16.

Finally, Judge Lamberth simply found that mandamus was appropriate in his discretion under the above circumstances. See id. at 17.

Ruling in his memorandum opinion that the Government was entitled to mandamus, Judge Lamberth then issued mandamus to Judge Facciola in the form of an order prohibiting Judge Facciola from "1) considering selective or vindictive prosecution as a defense to the merits of the prosecution, 2) allowing evidence as to either claim, 3) entertaining any motion filed by [Lt. Choi] to dismiss the information based on selective or vindictive prosecution, and 4) considering sua sponte dismissal based on selective or vindictive prosecution." Oct. 11, 2011 Order (Exhibit B hereto).

Lt. Choi now files this Petition with this Court, seeking relief from Judge Lamberth's opinion and order. Simultaneously, in an abundance of caution, Lt. Choi is filing an interlocutory appeal, in the event that this Court finds that he has adequate relief in that mechanism.

JURISDICTION

This Court has jurisdiction of this Petition under 28 U.S.C. § 1651, the All Writs Act, and FRAP 21.

REASONS WHY A WRIT SHOULD ISSUE

This Court should issue a writ of mandamus to Judge Lamberth because Judge Lamberth clearly erred in granting the Government's "Petition" and in issuing mandamus to Judge Facciola, and/or Judge Lamberth abused his discretion in doing so and irreparably harmed Lt. Choi; there is no other adequate means of relief for Lt. Choi; and mandamus is appropriate under all the circumstances. In particular, whether Judge Lamberth had jurisdiction to even issue mandamus is an important novel issue for this Court, and Judge Lamberth's usurpation of judicial power is so harmful to justice as to require immediate correction by this Court.

I. No Other Adequate Means of Relief

Lt. Choi has no other adequate means of relief besides mandamus to address Judge Lamberth's usurpation and error. Since the Government filed a "Petition" in the District Court and not an interlocutory appeal with a motion to stay to this Court, the trial judge, Judge Facciola, is not prevented from resuming the trial now that mandamus has issued. If Judge Facciola resumes the trial and denies Lt. Choi the selective/vindictive-prosecution defense pursuant to Judge Lamberth's mandamus order, and then acquits Lt. Choi on the merits, Lt. Choi will not be able to obtain review of the denial of the defense, as a defendant presumably may not

appeal a complete acquittal. For the same reason, Lt. Choi would not be able to obtain review of any unnecessary delay in his trial occasioned by the Government's wrongful "petitioning," i.e., the time between when Judge Facciola suspended the trial and any putative decision by this Court invalidating Judge Lamberth's decision, because such review would necessarily involve whether the Government's "Petition" was proper in the first place. It would be contrary to democratic justice not to allow Lt. Choi to pursue his selective/vindictive-prosecution defense and thereby expose the Government's persecution of him, especially to prevent the Government from unreviewably doing the same to others.

And there is no question that the Government selectively/vindictively prosecuted Lt. Choi, as the evidence itemized in Lt. Choi's Response (at 36-46) to the Government's "Petition" shows. Indeed, while the Government's own "Petition" was pending, further evidence of that persecution came to light. The Secret Service finally at least partially responded to Lt. Choi's trial subpoena by disclosing White House emails (Exhibit C hereto) showing that political aides to President Obama—whom aides have said was angered by Lt. Choi's first two protests—solicited the Park Police and the Secret Service to charge Lt. Choi federally, even though as one Park Police officer later testified during Lt. Choi's trial no peaceful White House protestor in 22 years and 2,000 arrests had been charged federally, see Park Police Officer Jerome Stoudamire, 8/29/11 p.m. Tr. at

135. The Government referred to these newly-disclosed emails in its Reply (at 18) in support of its "Petition" to Judge Lamberth.

Also telling of the persecution is what Judge Lamberth's mandamus opinion did *not* say. Judge Lamberth's decision did not address the Government's prominent argument in its "Petition" that even if Judge Facciola could legally allow the selective/vindictive prosecution-defense at trial upon a prima facie showing by the defense, the evidence thus far at trial when Judge Facciola ruled did not amount to a prima facie showing of the defense.

Even if Judge Facciola convicted Lt. Choi, Lt. Choi arguably would not have a meaningful appeal of the denial of the selective/vindictive-prosecution defense. It is Judge Lamberth's order prohibiting Judge Facciola from allowing Lt. Choi the defense—in addition to Judge Facciola's compliance with that order—that actually harms Lt. Choi. However, Lt. Choi cannot normally appeal Judge Lamberth's order underlying the compliance, because Judge Lamberth is for Lt. Choi—but not the Government as will be discussed below—nominally the next appeal authority in the case, under FRCrP 58(g)(2). Moreover, to directly appeal Judge Lamberth to this Court, Lt. Choi would have to file an interlocutory appeal to this Court now or lose it. But an appeal would take excruciating time. In the interim, again, without a stay of proceedings, Judge Facciola could presumably resume trial and conduct it to conviction. If this Court then ultimately invalidates Judge Lamberth's

decision and remands for a retrial to allow the selective/vindictive-prosecution defense, the original trial would be a waste of money and time for the District Court, for Defendant Choi (who is not receiving state-provided assistance of counsel) and, notably, for the *Government*.

Indeed, it was the cost of litigating this case beyond what the Government presumed would be a perfunctory conviction of Lt. Choi that prompted the Government to claim irreparable harm in seeking mandamus in the first place and that prompted Judge Lamberth to grant mandamus in the first place. See supra. Indeed, Judge Lamberth dramatically declared in his mandamus opinion that "petitioner intimates that developing a response to [a selective-prosecution] claim [if allowed] could be so costly as to prohibit continued prosecution." Memo. Op. at 13. If the Government cannot afford to litigate a defense in an original trial, it certainly cannot afford to litigate an entirely new re-trial.

Even if the Court were to grant a stay of proceedings during the interlocutory appeal, Lt. Choi would still suffer the undue agony of the limbo of being indefinitely in the middle of a hanging trial.

II. Irreparable Harm

Lt. Choi is irreparably harmed by Judge Lamberth's opinion and order in that it denies Lt. Choi the selective/vindictive-prosecution defense. See Crane v. Kentucky, 476 U.S. 683, 690 (1986).

III. Clear and Indisputable Right to Relief

Lt. Choi has a clear and indisputable right to have this Court overturn Judge Lamberth, because Judge Lamberth had a clear duty *not* to issue mandamus.

A. Lack of Jurisdiction

Judge Lamberth clearly lacked jurisdiction to issue mandamus. As demonstrated above, Judge Lamberth's only justification for jurisdiction is that under the appeal provision of FRCrP 58(g)(2)(A) he allegedly stood in a quasi-appellate-court relationship to Judge Facciola, and Section 1651 mandamus jurisdiction applies to federal appellate courts. But Judge Lamberth himself refuted his own argument in this regard; he himself rejected the notion that he stood in an appellate position in this specific instance. In stating why the Government did not have other adequate means of relief, besides mandamus from him, Judge Lamberth stated that the Government had *no appeal* to him under FRCrP 58(g)(2)(A) because it would have no appeal to this Court if a District Court judge were hearing the case:

> Respondent counters by asserting that petitioner could have obtained review of Magistrate Judge Facciola's decision to permit a selective or vindictive prosecution defense in this Court. However, a party may only appeal a Magistrate Judge's order in a misdemeanor criminal trial if it could appeal a similar order rendered by a district court judge. Fed. R. Crim. P. 58(g)(2)(A).***Neither the Magistrate Judge's denial of the prosecution's motion in limine, nor the Magistrate Judge's mid-trial decision to allow the respondent to pursue a selective or vindictive prosecution defense, is an order from which the government could take an interlocutory appeal[.]"

Memo. Op. at 11. So by his own admission, Judge Lamberth did not stand in an appellate-court relationship to Judge Facciola.

In truth, what Judge Lamberth did was simply to usurp Judge Facciola's role as trial judge in this case.[2] That fundamentally violated separation of powers—because Congress granted magistrate judges the power to try misdemeanor cases, see 18 U.S.C. § 3401(a)—and Lt. Choi's due process and double-jeopardy rights—because he is entitled to have a single trial on the charge, not two trials before two different judges at the same time.

It must also be emphasized that even if Judge Lamberth were correct that he had quasi-appellate-court authority under FRCrP 58(g)(2)(A) in this instance, he would still lack both jurisdiction and grounds to issue mandamus. Again, Section 1651 mandamus can only issue from a true appellate court to an inferior court, and not between judges—even unequal under Articles I and III—of the same court—if only as a matter of comity. Moreover, the admission of the existence of an appeal to Judge Lamberth by the Government would by definition preclude mandamus, as it would clearly be existing adequate means of relief. Nor could Judge Lamberth have split the difference and treated the Government's "Petition" as an appeal.

[2] Telling of this fact is that the Government's "Petition" and Judge Lamberth's mandamus opinion and order thereto are captioned within the extant criminal case. Judge Lamberth recognized this defect during the oral hearing of the "Petition" when he noted that the "Petition" was not captioned separately and against Judge Facciola. See 10/10/11 Tr.

That would have violated Lt. Choi's due-process rights. Since the Government "Petition" was expressly not an appeal but a purported petition, Lt. Choi specifically responded to the "Petition" as a purported petition and not an appeal. He left out arguments and evidence that he would have included had he had notice that the "Petition" was to be treated as an appeal. Furthermore, a purported "petition" simply may not be treated interchangeably with an appeal. The very essence of mandamus is that it is *extraordinary* relief sparingly granted, with different elements from an appeal.

Judge Lamberth's hearing the "Petition" was also fundamentally unfair to Lt. Choi because it violated the conditions under which Judge Facciola suspended the trial and on which Lt. Choi justifiably relied in his trial strategy at the time. Judge Facciola specifically stated that he was suspending the trial so that the Government could seek mandamus from *this Court*, that is, the D.C. Circuit, and not Judge Lamberth.

B. No Irreparable Harm to the Government

Judge Lamberth also clearly lacked grounds to issue mandamus because the Government did not demonstrate irreparable harm caused by Judge Facciola's decision. Judge Lamberth found irreparable harm from the Government's *allegation* that it could not "afford" to defend against a selective/vindictive-prosecution defense *and* prosecute Lt. Choi at the same time. But this finding was

clearly erroneous. First of all, administrative expedience or costs, however burdensome, is never a legal ground for denying someone a fundamental constitutional right.

Moreover, the Government has held the keys to its own purse all along, to paraphrase a famous judicial rejoinder. The Government knew from before when it even filed the complaint/information against Lt. Choi that it was selectively/vindictively prosecuting him. The Government should be estopped from raising the issue of prejudice where, as in a case such as this, they were pretrial put on notice of the very defense they seek to strike. In fact, AUSA George had *repeated* opportunities before the first witness was even sworn at trial to avert the trial and any associated costs of rebutting the selective/vindictive-prosecution defense, and she rejected *all* of them. She did not dismiss the charge after Attorney Goldstone raised the defense on March 18, 2011. She did not dismiss the charge after Attorney Feldman raised the defense on August 24, 2011. She did not dismiss the charge after Attorney Feldman again raised the defense on August 25, 2011. Indeed, she refused to dismiss the charge even after when *Judge Facciola* at trial ruled there was a prima-facie case of selective/vindictive-prosecution, see 8/31/11 p.m. Tr. at 12 (JUDGE FACCIOLA: And if mandamus is denied, … are you going to dismiss this action? AUSA GEORGE: … government believes we have sufficient evidence to prove the defendant guilty. So … I would

have to say no."—a fact Judge Lamberth ignored even while noting that Lt. Choi's defense counsel at oral hearing on the Government's "Petition" stated that Lt. Choi would not consent to dismissal.[3] The Government may not "have its cake and eat it too;" refuse to even *move* to dismiss the prosecution, and then blame Lt. Choi for the costs of the continued prosecution.

Furthermore, Judge Lamberth found irreparable injury—"prohibitive" costs of the Government's responding to the selective/vindictive-prosecution defense—merely on the basis of the Government's own self-serving conclusory say-so. The Government in its "Petition" totally failed to demonstrate its "prohibitive" costs or to provide any particular breakdown of costs that the Government would incur in responding specifically to a selective/vindictive-prosecution defense, or what costs it would incur beyond those in responding to Lt. Choi's defenses on the merits. In fact, arguably there would be no additional costs. Lt. Choi was charged with failure to obey a lawful order. The discovery he seeks or would seek as a result of the Government's new disclosures at trial would just as easily fall under disproving the lawfulness of the alleged order as under proving selective/vindictive prosecution—as both go to the reason why the Government sought to prevent Lt.

[3] In fact, Lt. Choi had stated at one point to the Government that he would let the case be dismissed if the Government apologized for its selective/vindictive prosecution of him—an apology which would not have cost the Government anything monetary-wise.

Choi's protest—and it is undisputed that Lt. Choi has a right to do the former (disproving the lawfulness of the order).

Judge Lamberth also found a wholly speculative harm—which should have precluded mandamus because mandamus requires "clear" right to relief—in another respect. He found that the Government would incur costs in doing its own discovery into the alleged selective/vindictive prosecution, and in responding to Lt. Choi's discovery. But the Government would not have to do its own discovery if it simply chose not to. It would, monetary-wise, cost the Government nothing simply to let stand Judge Facciola's correct prima-facie finding of selective/vindictive prosecution, and to then otherwise simply litigate the merits of the charge. Moreover, the Government would not necessarily need to expend any funds in responding to Lt. Choi's discovery requests on the selective/vindictive prosecution, as the Government simply could raise privilege objections which if successful would preclude any discovery and therefore any cost or at least a significant part of the cost. As Judge Lamberth again ignored, Judge Facciola—as mentioned above—specifically provided for such objections in ruling that Lt. Choi could pursue the discovery.

C. No Clear and Indisputable Right to Relief for the Government

Judge Lamberth also clearly lacked grounds to issue mandamus because Judge Facciola was fully within his discretion to allow Lt. Choi to pursue the

selective/vindictive-prosecution defense at trial and was fully within his discretion to, either sua sponte or pursuant to Lt. Choi's motion, dismiss the charge at trial based on selective/vindictive-prosecution grounds. The whole essence of Judge Lamberth's conclusion that Judge Facciola should have prohibited the selective/vindictive-prosecution defense at trial is Judge Lamberth's premise that 1) normally the defense must first be raised pretrial by written motion exclusively, 2) Lt. Choi did not file such a motion, and 3) there was no "good cause" in the record for not filing such a motion. See Memo. Op. at 14-16. But Judge Lamberth's basic premise ignores the law, the facts, and logic.

This Court has never held that the selective/vindictive-prosecution defense falls under FRCrP 12(b)(3) as a defect in the institution of the proceedings that must be raised exclusively by pretrial written motion, versus, say, under FRCrP 12(b)(2) as a matter that may be raised at trial, or not under any Rule also leaving the matter open for trial. Indeed, Judge Lamberth had to cite to a sister-circuit case for his proposition. See id. at 15. In fact, this Court has apparently held just the opposite proposition, in United States v. Washington, 705 F.2d 489, 227 U.S. App. D.C. 184 (D.C. Cir. 1983), where the Court apparently allowed the selective-prosecution defense mid-trial after evidence of the defense came out.[4]

[4] Judge Lamberth said that Lt. Choi cited Washington for the proposition that selective prosecution is a defense on the merits that allows a judge to acquit a defendant. See Memo. Op. at 14. However, Lt. Choi never cited Washington for

Moreover, there are compelling reasons to conclude that the defense does not fall under FRCrP 12(b)(3), as Lt. Choi discussed in his Response (at 30-34) to the Government's "Petition." Primary among these reasons is that—as Judge Lamberth totally glossed over—selective/vindictive-prosecution discovery is *not* a matter of right even pretrial. A defendant must have a certain quantum of evidence of selective/vindictive prosecution both to even get discovery on the defense, and to move to dismiss based on the defense. If a defendant lacks that quantum, he or she may not or cannot move the issue pretrial—even if he or she believes the defense applies or he or she has *some* evidence of the defense or of a theory of the defense though not enough to meet the threshold. Thus, there logically cannot be a rule normally limiting the defense to pretrial motion, because—unlike civil trials—the defendant is not entitled to extensive pretrial-discovery and the trial is the principle loci of evidence disclosure.

Additionally, there is the "good cause" exception of FRCrP 12(e), which clearly applied in this case. Judge Lamberth again conclusorily found no evidence of "good cause" in the record, but he completely ignored the record[5] to make such a finding. It is indisputable that the actual Government communications—the

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that proposition, nor made such an argument, as a review of his Response will indicate. Lt. Choi cited Washington for the proposition that selective prosecution is a procedural defense that may be raised at trial to dismiss the charge, as argued above.

[5] In fact, he had very little of the record from the Government's "Petition" to look at, because the Government did not even bother attaching transcripts.

email, the memorandum, and the oral communications between government officials, all showing that the Government politically targeted Lt. Choi for heightened charge—were not disclosed to Lt. Choi or in his possession pretrial despite his discovery request for such material, and that the first time they were disclosed to him was during trial. See supra. That was obvious "good cause" for the selective/vindictive-prosecution defense or a new theory of it to be pursued at trial.

Judge Lamberth also dismissed Lt. Choi's argument, that because Judge Facciola intentionally did not set a pretrial motions-deadline and in fact specifically deferred the matter of the selective-prosecution defense to trial, Lt. Choi did not waive the defense by not filing a pretrial written motion, as "defying reasonable belief." Memo. Op. at 16. But Lt. Choi pretrial orally raised the motion of the defense and did not have to do anything else—particularly because Judge Facciola ruled he would hear the defense at trial.

Judge Lamberth held that a deliberate failure to file such a pretrial motion automatically constitutes waiver without good cause, but that simply is not what the Rule says. FRCrP 12(e)[6] says that the Judge must have set a deadline before

[6] A "party waives any Rule 12(b)(3) defense, objection, or request not raised *by the deadline* the *court sets* under Rule 12(c) or by an extension the court provides." (Emphasis added.)

which the defendant failed to file the pretrial motion, for waiver to occur. Judge Lamberth could not simply rewrite the Rule.[7]

The record clearly shows that Lt. Choi repeatedly raised the selective-prosecution defense pretrial, and that Judge Facciola simply made the decision to defer the matter until at trial. That was sufficient to entitle Lt. Choi to pursue the defense at trial. Judge Facciola reasonably made that decision in his discretion as trial judge as to the mode of the trial. See United States v. Ashton, 555 F.3d 1015, 1021, 384 U.S. App. D.C. 368 (D.C. Cir. 2009); United States v. Ferguson, 778 F.2d 1017, 1020 (4th Cir. 1985); FRE 611(a). Given the misdemeanor nature of the case and the out-of-town status of the entire defense team, it was reasonable for Judge Facciola to conclude that it was more efficient for all concerned—including the Government—to have only one evidence hearing (the trial) at which both procedural and merits defenses would be heard. Indeed, if the evidence at trial never presented a prima facie case of selective prosecution, then the matter would have been moot and cost no one anything.

And the Government clearly accepted that mode of efficiency in the chance of not having to deal with the defense at all much less pretrial. The Government

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[7] Judge Lamberth essentially stated that if a judge does not set a deadline, the last day before trial becomes the deadline by default. See Memo. Op. at 16. But if that were the case, the Rules Framers would have said, and could have said, to that effect. Because they did not, the presumption is that an actual deadline must be set for there to be waiver.

did not immediately file an interlocutory appeal or a petition for mandamus challenging Judge Facciola's August 25, 2011 decision to defer the defense to trial, which it easily could have done between August 25, 2011 and August 29, 2011. Instead, the Government merely filed a last-minute motion in limine on the day before trial after Lt. Choi had rejected its plea offer of a complete dismissal with a condition of not getting arrested for several months. But even after then, when at the beginning of trial on the first day Judge Facciola deferred the Government's motion in limine until after the presentation of the defense, the Government *still* did not immediately ask Judge Facciola to suspend the trial so that the Government could file an interlocutory appeal or petition for mandamus and/or file such appeal/petition after trial had adjourned that day but before the end of the day. Instead, the Government over the next two days put on its case and preemptively mounted a rebuttal of the selective-prosecution defense, see 8/31/11 a.m. Tr. at 58-59, 70; 8/29/11 p.m. Tr. at 130.

It was only when, after three days of trial had already occurred, Judge Facciola pursuant to Lt. Choi's motion to compel and oral motion of the selective-prosecution defense ruled that Lt. Choi had made out a prima facie case of selective/vindictive prosecution and indicated that he would grant discovery on that prosecution, that the Government developed a problem with Judge Facciola's decided mode of conducting the case. But the Government, again, simply could

not "have its cake and eat it too." By not timely seeking review of Judge Facciola's August 25, 2011 deferral of the selective-prosecution-defense matter to trial, the Government waived any objections it had to that deferral.

Indeed, the Government simply could not legally let three days of trial occur—where the Government itself litigated the selective/vindictive-prosecution defense, costing the District Court, Lt. Choi, *and* the Government significant resources, money, and time—and then cry that further trial would be too costly. At the very least, Lt. Choi relied in his trial strategy during those three days on the Government's continued acquiescence in Judge Facciola's deferral.

For all of these reasons, Lt. Choi asks this Court to grant his Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have caused a copy of the foregoing Petition to be served by personal hand-delivery, on this 7th day of ~~October~~ November 2011, upon the Honorable Royce C. Lamberth and the Honorable John M. Facciola, as well as AUSA Angela George, U.S. Attorney's Office for the District of Columbia, 555 4th St., NW, Rm. 4444, Washington, D.C., 20530.

DANIEL CHOI

CERTIFICATE AS TO PARTIES AND AMICI

Pursuant to Circuit Rule 28(a)(1)(A), I hereby certify the following:

Parties and Amici

The parties below and on appeal are the United States of America and Daniel Choi. There were no amici below.

DANIEL CHOI

EXHIBIT LIST

A OCTOBER 11, 2011 MEMORANDUM OPINION

B. OCTOBER 11, 2011 ORDER

C. WHITE HOUSE EMAILS

D. GOVERNMENT PETITION FOR MANDAMUS BELOW

E. DEFENDANT CHOI RESPONSE TO THAT PETITION

A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	
Petitioner,	
v.	
	Magistrate No. 10-739-11
DANIEL CHOI,	
Respondent.	

MEMORANDUM OPINION

Before the Court is the government's Petition for Writ of Mandamus [64]. The government seeks a writ of mandamus to prevent Magistrate Judge John Facciola from considering selective or vindictive prosecution as either a defense to the merits of the prosecution of respondent Daniel Choi, or as the basis for a dismissal of the prosecution. Upon consideration of the Petition, the respondent's Response thereto [70], the government's Reply [82], and the oral argument of counsel, this Court will GRANT the Petition and issue a writ of mandamus directing Magistrate Judge Facciola not to consider any claims of selective or vindictive prosecution as a substantive defense on the merits of the government's underlying prosecution, or to dismiss the information on those grounds, or to permit the introduction of evidence relevant to these claims.

I. BACKGROUND

This Petition arises out of the bench trial of respondent Daniel Choi by Magistrate Judge Facciola for failure to obey a lawful order under 36 C.F.R. § 2.32(a)(2), a Class B misdemeanor. Respondent and 12 other individuals handcuffed themselves to the White House fence on

November 15, 2010, in protest of the armed forces' then-current "Don't Ask, Don't Tell" policy.[1] The United States Park Police directed the protestors to leave the area three times,[2] and arrested the protestors following their continued non-compliance. The arrest was respondent's third in nine months, each for the same criminal conduct. The government offered the protestors deferred-sentencing agreements, pursuant to which the protestors would plead guilty to the charge of failure to obey a lawful order and the government would refrain from prosecution, subject to various conditions. Respondent's 12 co-protestors accepted the agreements; respondent did not.

On August 24, prior to the start of trial, the government became aware during conversation between counsel that respondent was considering a selective prosecution claim, based primarily on the fact that he had been arrested twice prior for similar conduct but had not faced federal prosecution for those offenses. At a status conference the next day, government counsel raised this issue with Magistrate Judge Facciola and argued that the respondent had to raise it in a pre-trial motion to dismiss; Magistrate Judge Facciola responded that he would consider the issue at trial. The following day, the government offered the respondent a deferred-prosecution agreement, pursuant to which the government would dismiss the complaint, subject to various conditions. The respondent declined the offer. The government filed a pre-trial motion in limine on the evening of August 28, the day before the start of trial, to prevent defense counsel from raising this issue. In the motion, the government argued 1) that a selective prosecution claim must be raised in a pre-trial motion to dismiss or is otherwise waived under

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[1] The military's "Don't Ask, Don't Tell" policy directed servicemen and women to neither inquire nor volunteer information about the sexual orientation of other servicemen and women. The Pentagon formally repealed the policy on September 20, 2011, allowing openly gay individuals to serve in the armed forces. *See generally* Ed O'Keefe, "*'Don't ask, don't tell' ends in quiet, personal ways*," Washington Post, September 20, 2011.

[2] Respondent contends that the police issued orders to leave the sidewalk, and that the defendant, while chained to the White House fence, was not actually on the sidewalk but on the masonry base.

Rule 12(b)(3)(A), and 2) that the respondent failed to assert a *prima facie* case of selective prosecution.

Immediately prior to trial on the morning of August 29, 2011, the government requested that Magistrate Judge Facciola rule on the motion in limine. Government counsel again raised its argument that a selective prosecution claim is not a defense to the merits of the prosecution and must be raised pre-trial. Magistrate Judge Facciola continually referred to the issue as a defense and declined to rule on the motions. At that point, trial commenced. During trial, respondent presented evidence in support of his selective prosecution claim. Magistrate Judge Facciola on August 31 stated that he viewed the evidence as supporting a vindictive prosecution claim as opposed to a selective prosecution claim, that he would allow the respondent to further pursue the claim as a defense, and that he would ask for briefing on the issue at the conclusion of the trial. When asked by the government to clarify whether he would permit the defendant to pursue these claims as a defense on the merits, Magistrate Judge Facciola replied in the affirmative. At that point, Magistrate Judge Facciola asked the government whether it wished for him to stop the proceedings to allow the government to seek mandamus; the government agreed, and Magistrate Judge Facciola stayed the proceedings.

The government filed the instant Petition for Writ of Mandamus on September 12, 2011. The government seeks a writ of mandamus directing Magistrate Judge Facciola to 1) refrain from considering a defense of selective or vindictive prosecution, 2) refrain from allowing the defendant to introduce further evidence in support of such claims, 3) treat any motion to dismiss the prosecution based on such claims as waived, and 4) refrain from considering dismissal based on such claims sua sponte.

II. DISCUSSION

A. Jurisdiction

Respondent argues that this Court lacks jurisdiction to issue a writ of mandamus directed to Magistrate Judge Facciola. Respondent cites no law expressly forbidding a district court from issuing a writ of mandamus to a magistrate of the same court, but instead relies primarily on the novelty of such a writ. Although this Court is unaware of any reported decision in which a district court issued a writ of mandamus to a magistrate judge, the rarity of such an order is not conclusive. Rather, the Court must undergo an analysis of the statutory bases for mandamus jurisdiction to determine whether a district court is so empowered.

Writs of mandamus are governed by two statutes. The first, more general statute, is the All Writs Act, 28 U.S.C. § 1651. That Act states:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary and appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

In turn, Congress has separately conferred jurisdiction on the district courts to entertain suits "in the nature of" mandamus in 28 U.S.C. § 1361:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

Petitioner does not argue that 28 U.S.C. § 1361 grants the requisite authority. Although the text of the statute would seem to permit jurisdiction here – after all, magistrate judges are employees of the United States – § 1361 is only a source of jurisdiction for district courts to exercise writs of mandamus to employees of the *Executive* branch. *See, e.g.*, *Trackwell v. United States Government*, 472 F.3d 1242, 1247 (10th Cir. 2007); *Liberation News Service v. Eastland*, 426 F.2d 1379, 1384 (2d Cir. 1970) ("[I]n enacting []§1361 . . . Congress was thinking solely in terms of the executive branch.") (Friendly, J.); *King v. Russell*, 963 F.2d 1301, 1304 (9th Cir.

1992) (applying the rationale of *Eastland* to bar § 1361 action against bankruptcy court officers). A magistrate judge exercises Article I authority subject to the supervision of the district court, *see United States v. Raddatz*, 447 U.S. 667, 681-84 (1980), and is not a member of the Executive branch. A district court thus may not issue a writ of mandamus to a magistrate judge pursuant to § 1361.

The All Writs Act, upon which petitioner relies, is most commonly invoked by a federal circuit court of appeals to issue a writ of mandamus to a district court judge, or by the Supreme Court to issue a writ to a lower court judge. *See Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980) ("[T]he writ of mandamus has traditionally been used in the federal courts only to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." (quotations omitted)); *id.* at 34 (noting that under the Act, "*courts of appeals* may issue a writ of mandamus . . ." (emphasis added)); *see, e.g.*, *In re Papandreou*, 139 F.3d 247 (D.C. Cir. 1998) (issuing writ of mandamus to a district court). Key to a court's issuance of a writ of mandamus is that it be acting in support of its appellate jurisdiction. *Cf. Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 86 (1970) (holding that the Supreme Court can only issue a writ of mandamus "insofar as such writs are in aid of its appellate jurisdiction"). Thus, a federal court of appeals may not issue a writ of mandamus to a state court, because a federal court of appeals does not exercise appellate jurisdiction over any state court. *See, e.g., White v. Ward*, 145 F.3d 1139, 1140 (10th Cir. 1998); *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 476 (1983) (noting that, unlike the federal courts of appeals, the Supreme Court does retain appellate jurisdiction over state courts). Likewise, a federal court of appeals may not issue a writ of mandamus to another federal court of

appeals, or to a district court outside of the court of appeals' circuit. *See Air Line Pilots Assn., Int'l v. Dep't of Transp.*, 880 F.2d 491, 503 (D.C. Cir. 1989).

Tellingly, while Federal Rule of Appellate Procedure 21(a)(1) refers explicitly to "a writ of mandamus . . . directed to a court," and while Supreme Court Rule 20 governs petitions for extraordinary writs "in aid of the Court's appellate jurisdiction," neither the federal rules of civil nor criminal procedure refers to appellate mandamus. Indeed, Federal Rule of Civil Procedure 81(b) purports to abolish the common-law writ of mandamus. And while the Circuit Court of Appeals for the D.C. Circuit has held that § 1361 permits district courts to entertain jurisdiction "over actions in the nature of mandamus" notwithstanding Rule 81(b), *In re Cheney*, 406 F.3d 723, 729 (D.C. Cir. 2005) (en banc) (quotations omitted), the Court indicated that the Rule "long ago abolished the writ of mandamus in the district courts (*although not in the appellate courts*)," *id.* (emphasis added). Thus, under D.C. Circuit precedent, it is unclear whether any powers of appellate mandamus that a district court may have held under the All Writs Act survived the adoption of Rule 81(b).

Reference to a district court's purported power of appellate mandamus seems oxymoronic, as a district court is a trial level court in the federal judicial system. It generally lacks appellate jurisdiction over other judicial bodies, and cannot exercise appellate mandamus over other courts. *See, e.g., Lewis v. Green*, 629 F. Supp. 546, 553 (D.D.C. 1986) (finding that the Court lacked authority to issue a writ of mandamus to a judge in another district court, and that such a writ "may be issued only by a superior court"); *Fabuluje v. Sanders*, Civ. No. 01-992, 2001 U.S. Dist. LEXIS 13231, *4 (N.D.Tex. June 20, 2001) (holding that a district court lacks authority to issue "a writ of mandamus to another judge of the same court"). However, this case is of the unique posture where this Court is being asked to review the conduct of a magistrate

judge in a quasi-appellate capacity. Although the nature of the district court-magistrate relationship is usually not analogous to the relationship between a court of appeals and a district court, this case presents important distinctions.

Generally, a magistrate judge's acts are subject to the full supervisory authority and control of the district court. *Cf. Raddatz*, 447 U.S. at 681-84. Thus, when a district court judge considers objections to a magistrate judge's ruling, *see* Local Criminal Rule 59.1, 59.2, the exercise is not an "appeal." The magistrate judge is not an inferior court, and the district court does not stand in an appellate capacity over the magistrate. But where, as here, a magistrate judge conducts a trial of a federal misdemeanor offense pursuant to 18 U.S.C. § 3401, Federal Rule of Criminal Procedure 58, and Local Criminal Rule 58, the matter is more complicated. Section 3401 grants magistrate judges "jurisdiction to try persons accused of, and sentence persons convicted of, misdemeanors committed within that judicial district" if the defendant does not object. 18 U.S.C. § 3401(a). In turn, Federal Rule of Criminal Procedure 58 governs the process. Fed. R. Crim. P. 58(g)(2)(A) covers "[i]nterlocutory [a]ppeal[s]," allowing parties to "*appeal* an order of a magistrate judge to a district judge . . . if a district judge's order could similarly be appealed" (emphasis added). Similarly, Local Rule 58(e) refers to "[a]ppeal from a magistrate judge's order or judgment." In a federal misdemeanor case, unlike in other settings, a district court judge does not refer the matter to a magistrate, and does not exercise blanket supervisory powers; to the contrary, the district court judge cannot intervene prior to a final judgment unless a court of appeals could so intervene. In that sense, the magistrate judge's direction of a misdemeanor trial more closely appears to constitute a separate "court" than do most magistrate functions.

Further complicating the matter is the occasional willingness of courts to rely on the All Writs Act to issue writs of mandamus to Article I agencies over which the court retains appellate jurisdiction. *See Cox v. W.*, 149 F.3d 1360, 1364 (Fed. Cir. 1998) (approving of Court of Veterans Appeals issuance of writ to Board of Veterans' Appeals). In addition, district courts have occasionally, in an appellate capacity, issued writs of mandamus directed to bankruptcy courts. *See, e.g., In re Calore Express Co.*, 266 B.R. 727, 733 (D. Mass. 1998); *cf. In re Pappas & Rose, P.C.*, 229 B.R. 815, 818 (W.D. Okla. 1998) (determining that a district court lacks mandamus jurisdiction over a bankruptcy court decision unless the district court's appellate jurisdiction is invoked). Thus, although the All Writs Act would generally not permit a district court judge to issue a writ of mandamus to an Article I-created magistrate judge exercising authority subject to the supervision of the district court, the situation in which a magistrate judge conducts a misdemeanor criminal trial creates a situation to which the All Writs Act may apply.

Cases petitioner cites provide little guidance. In *Washington Post v. Robinson*, 935 F.2d 282 (D.C. Cir. 1991), the district court considered both a petition for writ of mandamus to the magistrate judge and an appeal from the magistrate judge's order denying a motion to unseal portions of a plea agreement. The district court denied the petition and affirmed the order; the D.C. Circuit vacated the affirmance and the magistrate judge's order. *Id.* at 292. The D.C. Circuit did not pass on the propriety of the filing of the petition in the district court. Similarly, in *United States v. Lee*, 786 F.2d 951 (9th Cir. 1986), the Ninth Circuit expressly did not determine whether it is proper to file a petition for writ of mandamus with a district court. *Id.* at 956 ("We need not reach that issue.") Finally, in *Califano v. Moynahan*, 596 F.2d 1320 (6th Cir. 1979), the Sixth Circuit declined to issue a writ of mandamus when the petitioner could have moved for the

district judge to vacate the magistrate's order or to obtain a report and recommendation from the magistrate. *Id.* at 1322. None of these cases squarely addresses the issue at hand.

United States v. Ecker, 923 F.2d 7 (1st Cir. 1991), most directly advances petitioner's case. There, the First Circuit noted that the defendant could have obtained review of a magistrate's commitment order from the district court by moving for reconsideration in the district court. Following that conclusion, the Court continued: "If [defendant] wanted a writ of mandamus directing the magistrate to rescind his commitment order . . . he should have directed his argument to the district court originally." *Id.* at 9. It is unclear whether by "directed his argument to the district court originally," the Court was referring to filing a petition for writ of mandamus with the district court, or to the simple motion for reconsideration to which it earlier alluded. Assuming the former, this quotation, which cites to *Califano*, appears to approve of the practice of filing a petition for writ of mandamus to a magistrate judge with a district court. However, *Califano* does not stand for that proposition, and *Ecker* is bereft of further reasoning as to why the district court would be the appropriate venue.

In the absence of any case squarely finding jurisdiction in a district court to issue a writ of mandamus pursuant to the All Writs Act to a magistrate judge, the Court is wary of finding the existence of such jurisdiction. Although exceptions exist, the All Writs Act generally applies only when a true superior court – the Supreme Court, or a circuit court of appeals – issues a writ of mandamus to a true inferior court, primarily a district court. Further, the D.C. Circuit's indication in *Cheney* that district courts' authority to issue writs of mandamus under the All Writs Act has been abrogated provides this Court further reason not to purport to exercise such jurisdiction. But although this Court is hesitant to do so, the analogy between a federal circuit court of appeals and a district court on the one hand, and a district court and a magistrate on the

other, is inescapable in misdemeanor cases such as these where the magistrate judge exercises full authority over the trial, subject to review of the district court only insofar as a circuit court of appeals could exercise review over a district court trial. In this situation, as when a district court reviews a bankruptcy court order, *see In re Calore Express Co.*, 266 B.R. at 733, the district court is acting as an appellate body. The D.C. Circuit's language in *Cheney*, while appearing to deem mandamus jurisdiction non-existent at the district court level, did not seem to take account of the limited but important appellate functions that a district court occasionally fulfills. Accordingly, the Court holds that the All Writs Act permits district courts to issue writs of mandamus to magistrate judges when, under the applicable statutes and rules, the district court sits in an appellate capacity vis a vis the magistrate judge.

B. Merits

The issuance of a writ of mandamus pursuant to the All Writs Act "is a drastic and extraordinary remedy reserved for really extraordinary causes." *Cheney v. United States District Court*, 542 U.S. 367, 380 (2004) (quotations omitted). "[O]nly exceptional circumstances amounting to a judicial usurpation of power, or a clear abuse of discretion, will justify the invocation of this extraordinary remedy." *Id.* (quotations and internal citations omitted). In order to establish a right to this rare form of relief, a petitioner must show 1) that he has "no other adequate means to attain the relief he desires," in order to prevent use of the writ as an end run around the normal appeals process, *id.* at 380-81, 2) that his "right to issuance of the writ is clear and indisputable," *id.* at 381 (quotations omitted), and 3) that the lower court has a clear duty to act, *United States v. Monzel*, 641 F.3d 528, 532 (D.C. Cir. 2011). Furthermore, even if the petitioner is able to satisfy the above criteria, the Court must still avail itself that, "in the exercise of its discretion . . . the writ is appropriate under the circumstances." *Id.*

1. No adequate means

Petitioner seeks essentially two types of mandamus relief. First, petitioner seeks an order preventing Magistrate Judge Facciola from considering selective or vindictive prosecution as a defense on the merits. Second, petitioner seeks to bar Magistrate Judge Facciola from dismissing the information based on selective or vindictive prosecution. As to the first form of requested relief, petitioner indeed has no other adequate means of relief other than a writ of mandamus. Once the prosecution in respondent's bench trial called its first witness, respondent's rights against double jeopardy attached, *Serfass v. United States*, 420 U.S. 377, 388 (1975). If Magistrate Judge Facciola enters a judgment of acquittal in favor of respondent, petitioner will be unable to appeal that decision. *Yeager v. United States*, 129 S. Ct. 2360, 2366 (2009). Thus, mandamus is the only means by which petitioner can obtain review of its argument that selective and vindictive prosecution are not defenses on the merits to a prosecution.

Respondent counters by asserting that petitioner could have obtained review of Magistrate Judge Facciola's decision to permit a selective or vindictive prosecution defense in this Court. However, a party may only appeal a Magistrate Judge's order in a misdemeanor criminal trial if it could appeal a similar order rendered by a district court judge. Fed. R. Crim. P. 58(g)(2)(A). The government may only pursue an interlocutory appeal from a district court order in a criminal case in limited circumstances, such as where the order dismisses an indictment or information, grants a new trial, excludes or suppresses evidence, or grants the defendant release. 18 U.S.C. § 3731. Neither the Magistrate Judge's denial of the prosecution's motion in limine, nor the Magistrate Judge's mid-trial decision to allow the respondent to pursue a selective or vindictive prosecution defense, is an order from which the government could take an interlocutory appeal – the Magistrate Judge's order did not exclude or suppress any evidence

or dismiss the information. Respondent posits no other procedural posture, and the Court is unaware of any, by which petitioner could otherwise seek review of this issue. Mandamus is thus petitioner's only option.

Petitioner's other desired form of relief is a directive to Magistrate Judge Facciola that respondent has waived any selective or vindictive prosecution argument in support of dismissal. As to a sua sponte dismissal by Judge Facciola, the government would indeed lack an alternate form of relief. The government may only appeal from a dismissal of an indictment or information under 18 U.S.C. § 3731 if such appeal would not conflict with the defendant's double jeopardy rights. Accordingly, petitioner can only appeal an order by Magistrate Judge Facciola sua sponte dismissing the information against respondent to this Court if such an appeal would be consistent with the Double Jeopardy Clause. While the constitutional protection against double jeopardy is not a bar to a government appeal from the dismissal of an indictment or information upon motion of the *defendant*, *United States v. Scott*, 437 U.S. 82, 101 (1978), double jeopardy protects a defendant from retrial when the defendant does not consent to the dismissal. *See id.*; *United States v. Pharis*, 298 F.3d 228, 244 (3d Cir. 2002) (en banc). Defense counsel indicated at oral argument that respondent would not consent to a dismissal. Such a dismissal would thus preclude further review of the issue.

Because respondent apparently would not consent to a dismissal of the information, it is unlikely that he will file a motion to dismiss on his own accord. Such a dismissal would be reviewable by this Court because, under *Scott*, double jeopardy would not bar a subsequent prosecution. Normally, the availability of this alternate means of review would prevent this Court from issuing a writ of mandamus preventing respondent from filing a motion to dismiss on this basis. However, the requirement that there be no adequate means of review may be waived

if the petitioner will suffer irreparable harm as a result of a delay in review. *Banks v. Office of the Senate Sergeant-at-Arms*, 471 F.3d 1341, 1350 (D.C. Cir. 2006). Here, petitioner alleges that it would incur significant expense in conducting discovery, and responding to discovery requests, regarding a selective or vindictive prosecution claim. Indeed, petitioner intimates that developing a response to such a claim could be so costly as to prohibit continued prosecution. Assuming that respondent has clearly and indisputably waived a motion to dismiss on these grounds, the Court agrees that petitioner would be irreparably harmed in having to disprove a legal claim that respondent is not entitled to make.

Respondent contends that petitioner will not be harmed because Magistrate Judge Facciola may ultimately convict respondent of the offense, notwithstanding the selective or vindictive prosecution defense. True enough. But the harm alleged here is not the potential erroneous dismissal or acquittal; it is the expense required to disprove the claim. The decision to permit a selective or vindictive prosecution defense or dismissal need not necessarily be outcome-determinative in respondent's favor in order to be subject to a writ of mandamus. *Cf. La Buy v. Howes*, 352 U.S. 249, 260 (1957) (affirming circuit court of appeals' issuance of writ directing district court to vacate order referring antitrust cases for trial before a special master). Accordingly, even though petitioner would have a right to appeal a dismissal of the information if made on motion by respondent, the Court will not treat this as a bar to mandamus relief.

2. Clear and indisputable right to issuance, and clear duty to act

In addition to showing a lack of alternative means for review of the decision complained of, petitioner must show a clear and indisputable right to issuance of the writ and a clear duty on the part of the lower court to act. As to the issue of the use of selective or vindictive prosecution as a defense on the merits, petitioner is successful. Claims of selective and vindictive

prosecution are indisputably not "defense[s] on the merits to the criminal charge itself, but . . . independent assertion[s] that the prosecutor has brought the charge for reasons forbidden by the Constitution." *United States v. Armstrong*, 517 U.S. 456, 463 (1996); *see also United States v. Washington*, 705 F.2d 489, 495 (D.C. Cir. 1983); *United States v. Jarrett*, 447 F.3d 520, 525 (7th Cir. 2006) (applying *Armstrong* to vindictive prosecution claim). Such claims do not bear on the fact of a defendant's guilt or innocence, but instead allege a bar against prosecution. Indeed, while respondent repeatedly refers to the claim as a "defense," he concedes that it is not a defense *on the merits*. There is no legal basis for Magistrate Judge Facciola to enter a judgment of acquittal on the grounds that the government selectively or vindictively prosecuted respondent, and thus the magistrate has a clear duty to refrain from entering such an acquittal. Petitioner is thus entitled to a writ of mandamus on this issue.

Respondent argues that the D.C. Circuit approved the use of a selective prosecution defense on the merits in *United States v. Washington*. Reliance on that case is misplaced. In *Washington*, the defendant was convicted for submitting forged birth certificates in connection with a passport application. The defendant on appeal argued that she was selectively prosecuted because she was a member of the Black Hebrews, a religious group then engaged in settlement disputes with the Israeli government. The defendant contested the trial court's resolution of the issue, arguing that a claim of selective prosecution was an issue of fact for resolution by the jury. In affirming the trial court, the D.C. Circuit noted that "the issue of selective prosecution is one to be determined by the court . . . as it relates to an issue of law entirely independent of the ultimate issue of whether the defendant actually committed the crimes for which she was charged." *Washington*, 705 F.2d at 495. The case in no way can be read to support the notion that a successful selective prosecution claim constitutes a basis for an acquittal.

Petitioner has additionally shown a clear and indisputable right on its part, and a duty on the part of Magistrate Judge Facciola, regarding a dismissal on the merits. Petitioner asserts that, under the Federal Rules of Criminal Procedure, a selective or vindictive prosecution claim normally must be made prior to trial. Petitioner is correct. Rule 12(b)(3)(A) requires defendants to raise "a motion alleging a defect in instituting the prosecution" before trial commences. Under *Armstrong* and *Washington*, a claim of selective or vindictive prosecution is a claim that alleges a defect in instituting the prosecution – namely, that the government is bringing the prosecution for constitutionally forbidden reasons. These claims thus must be made prior to the commencement of trial, or they are by default deemed waived under Rule 12(e). *See, e.g.*, *United States v. Huber*, 404 F.3d 1047, 1054-55 (8th Cir. 2005). Because respondent did not submit a pre-trial motion to dismiss on the basis of these claims, he generally could not raise them following the commencement of trial.

It is true that Rule 12(e) contains a provision stipulating that, "[f]or good cause, the court may grant relief from the waiver." Magistrate Judge Facciola would therefore have authority to permit a mid-trial motion to dismiss the information on the basis of selective or vindictive prosecution were he to determine that good cause for the delay existed. Petitioner vigorously asserts that no good cause exists, primarily because respondent was aware of the basis for these claims prior to the start of trial. This Court, seeing absolutely no basis in the record for a finding of good cause, agrees. Respondent tries to establish such cause by alleging that he could not have made out a prima facie case of selective or vindictive prosecution prior to the development of trial testimony. Respondent additionally appears to make an argument in support of good cause based on defense counsel's mistaken impression that, because Rule 12(e)'s text treats as waived Rule 12(b)(3) motions "not raised by the deadline the court sets under Rule 12(c),"

Magistrate Judge Facciola's failure to set a Rule 12(c) deadline earlier than the trial date permitted defense counsel to make Rule 12(b)(3) motions *after* the commencement of trial. These arguments defy reasonable belief, and thus Magistrate Judge Facciola could not find good cause to excuse a Rule 12(e) waiver. The magistrate thus has a clear duty not to consider a motion to dismiss on the basis of selective or vindictive prosecution, either sua sponte or on motion by respondent.

3. Appropriate under the circumstances

It appears to the Court that, as to all its forms of requested relief, petitioner has established a right to a writ of mandamus. The Court is further satisfied that, under the circumstances, issuance of the writ is appropriate. Although the issuance of a writ of mandamus is an "extraordinary remedy," *Cheney*, 542 U.S. at 380, and although this Court approaches the decision to issue the writ with reluctance and "with great caution," *Banks v. Office of the Senate Seargant-at-Arms*, 471 F.3d 1341, 1350 (D.C. Cir. 2006), the Court is satisfied that this case presents a rare set of circumstances requiring this Court's intervention. Magistrate Judge Facciola has indicated that he may enter a judgment of acquittal in favor of respondent for reasons wholly unrelated to the merits of the respondent's defense. Such a decision would be unreviewable, since jeopardy has attached. Further, Magistrate Judge Facciola has indicated that he may dismiss the information, sua sponte or on motion by respondent, on the basis of a legal argument that respondent has waived. Although a motion by respondent to dismiss would be reviewable, this Court sees no need to force petitioner to undergo the expense of responding to a claim that the Federal Rules of Criminal Procedure bar respondent from making.

In attempting to show that the equities are in his favor, respondent alludes to the alleged strength of his claim, and argues that petitioner has "dirty hands" because its motion in limine

was filed close to the start of trial and because of delay in response to discovery requests. But none of these assertions would render mandamus inappropriate here. The law is straightforward: selective and vindictive prosecution claims are not defenses on the merits but go to the constitutionality of the prosecution, and motions to dismiss based on defects in the institution of criminal proceedings must be brought prior to the start of trial unless good cause exists otherwise. In the exceedingly rare set of circumstances posed here, mandamus is the only credible option to enforce the law.

III. CONCLUSION AND ORDER

Petitioner is entitled to a writ of mandamus, and issuance of a writ is appropriate under the circumstances. The Court will therefore grant the Petition, and issue the writ.

A separate order shall issue as of this date.

10/11/11
Date

Royce C. Lamberth
ROYCE C. LAMBERTH
Chief Judge
United States District Court

B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Petitioner,

v.

DANIEL CHOI,

Respondent.

Magistrate No. 10-739-11

ORDER

Before the Court is the government's Petition for Writ of Mandamus [64]. In accordance with the corresponding Memorandum Opinion issued as of this date, it is hereby

ORDERED that the Petition is **GRANTED**, and that a writ of mandamus hereby issues to Magistrate Judge John Facciola in accordance with the corresponding Memorandum Opinion. Magistrate Judge John Facciola is prohibited from 1) considering selective or vindictive prosecution as a defense to the merits of the prosecution, 2) allowing evidence as to either claim, 3) entertaining any motion filed by respondent to dismiss the information based on selective or vindictive prosecution, and 4) considering sua sponte dismissal based on selective or vindictive prosecution.

SO ORDERED this 11th day of October 2011.

Royce C. Lamberth

ROYCE C. LAMBERTH
Chief Judge
United States District Court

C

U.S. Department of Homeland Security
UNITED STATES SECRET SERVICE

September 21, 2011

950 H Street, N.W.
Washington, D.C. 20223

VIA ELECTRONIC MAIL & U.S. MAIL

Robert J. Feldman, Esq.
40 Wall Street, 20th Floor
New York, NY 10005

Re: United States of America v. Daniel Choi
Case No.: 1:10-mj-000739-AK

Dear Mr. Feldman:

Enclosed please find documents responsive to your subpoena, dated August 30, 2011. Please be advised these documents include two email chains which were forwarded to Joseph Lozano of this office in this agency's efforts to comply with your subpoena. Therefore, the printed copies of the email chains include his name as the header.

Should you have any questions regarding this matter, please contact Deputy Special Agent in Charge Lozano at (202) 406-5771.

Sincerely,

Donna L. Cahill

Donna L. Cahill
Chief Counsel

cc: AUSA Angela George

JOSEPH LOZANO (LEG)

From: GARY COFFEY (UDW)
Sent: Friday, November 12, 2010 12:07 PM
To: RYAN LEMASTERS (UDW)
Subject: Fw: Get Equal DADT Protests -- Monday

GSC

From: Kiley, Bradley J. <Bradley_J._Kiley@who.eop.gov>
To: GARY COFFEY (UDW); PAULA REID (PPD)
Sent: Fri Nov 12 12:03:01 2010
Subject: Fw: Get Equal DADT Protests -- Monday

FYI.

From: Bond, Brian K.
To: Kiley, Bradley J.; Tchen, Tina; Messina, Jim; McDonough, Denis R.; Gavin, Tom; Inouye, Shin; Pfeiffer, Dan; Barnes, Melody C.
Sent: Fri Nov 12 12:00:10 2010
Subject: Get Equal DADT Protests -- Monday

I have it on pretty good authority that Get Equal is planning to do a major protest Monday in front of the WH to "kick off" lame duck – Choi will be a part of it – and if my sources are right – looks like they are planning on having 10-15 people handcuffed and arrested. Probably would be good to give Service the heads up.

Also there are likely two more brilliant moves that day -- they are supposedly planning to do sit-ins in Reid and Levin Senate offices as well.

Brian K. Bond
Deputy Director
White House Office of Public Engagement
Office: 202-456-2085
Cell: 202-503-5404

JOSEPH LOZANO (LEG)

From: Charles_Guddemi@nps.gov
Sent: Monday, November 22, 2010 12:16 PM
To: angela.george@usdoj.gov; Timothy_Hodge@nps.gov; Robert_LaChance@nps.gov
Cc: RYAN LEMASTERS (UDW)
Subject: Fw: POSSIBLE "Get Equal" demo on Monday with CD

AUSA George

Here is how the USPP were notified. USSS-UD Sgt. LeMasters notified us. His contact information is below in his e-mail.

Thanks

Charlie

Captain Charles J. Guddemi
United States Park Police
Commander, Special Forces
SWAT, K9, Motorcycle, Aviation and Special Event Units 1100 Ohio drive S.W.
Washington, D.C. 20024

Office (202) 610-7091
Fax (202) 426-0612

----- Forwarded by Charles Guddemi/USPP/NPS on 11/22/2010 12:12 PM -----

Stephanie Clark/USPP/NPS
11/12/2010 02:06 PM

To: Dennis Bosak/USPP/NPS, Jerry_Marshall@nps.gov, Philip Beck/USPP/NPS@NPS, Robert_LaChance@nps.gov, Terry_Felt@nps.gov, "Heather Putnam" <Heather_Putnam@nps.gov>, "Wayne Johnson" <Wayne_R_Johnson@nps.gov>, "Mark Adamchik" <Mark_Adamchik@nps.gov>, "Timothy McMorrow" <Timothy_McMorrow@nps.gov>

cc: "Charles Guddemi" <Charles_Guddemi@nps.gov>

Subject: Fw: POSSIBLE "Get Equal" demo on Monday with CD

Fyi.
Sgt Stephanie Clark
Special Events Coordinator
Special Forces, US Park Police
202-905-1612

From: "RYAN LEMASTERS (UDW)" [Ryan.Lemasters@usss.dhs.gov]
Sent: 11/12/2010 12:48 PM EST
To: Christopher Silva; Stephanie Clark; "Pecher, Andrew W." <Andrew.Pecher@uscp.gov>; "Gallo, John D." <John.Gallo@uscp.gov>
Cc: "ROBERT MCSWIGGAN (UDW)" <Robert.Mcswiggan@usss.dhs.gov>
Subject: POSSIBLE "Get Equal" demo on Monday with CD

Good afternoon. Can you advise if any of you have any additional on the following info? I just heard from a staff member over here that word on the street is that Get Equal is planning a protest Monday in front of the WH. Staff member also stated that he is hearing Choi will be in attendance and it is possible that 10-15 people will handcuff themselves to the fence.

Andy/John - The contact also stated that it is possible that they will conduct "sit-ins" in the Reid and Levin Senate Offices.

I don't have any further from the staffer, OS only reveals that the group is collecting cash for an upcoming "large action" (No specifics given). If I get any additional I will forward it along.

Good Times,
Ryan

Ryan Lemasters
Intelligence / Liaison Sergeant
United States Secret Service / Uniformed Division White House Branch
(O) 202-757-1133
(C) 202-538-9417

D

UNITED STATES DISTRICT FOR THE DISTRICT OF COLUMBIA

MAG. NO. 10-739-11

UNITED STATES OF AMERICA, **Petitioner,**

v.

DANIEL CHOI,

Respondent.

PETITION FOR WRIT OF MANDAMUS
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RONALD C. MACHEN JR.,
United States Attorney.

ROY W. McLEESE III,
GILBERTO GUERRERO,
ANGELA S. GEORGE, DC BAR #470567,
Assistant United States Attorneys.

555 4th Street, NW, Room 4444
Washington, DC 20530
(202) 252-7758

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	**Magistrate No. 10-739-11**
	:	
v.	:	
	:	
DANIEL CHOI,	:	
Defendant	:	
	:	

GOVERNMENT'S PETITION FOR WRIT OF MANDAMUS

PRELIMINARY STATEMENT

Defendant Daniel Choi is charged by criminal complaint with failure to obey a lawful order, pursuant to 36 C.F.R § 2.32(a)(2) (2011). On November 15, 2010, during a "Don't Ask, Don't Tell" (DADT) demonstration in front of the White House, the defendant and 12 others handcuffed themselves to the White House fence and refused to leave the area in response to three orders given by the United States Park Police (U.S.P.P.).[1] All 13 protestors were arrested and charged in the United States District Court for the District of Columbia with failing to obey a lawful order. Despite the fact that this was defendant Choi's third arrest in nine months for failing to obey a lawful order to leave the area after handcuffing himself to the White House fence during a DADT protest, each of the protestors, including defendant Choi, were offered the opportunity to resolve his or her case through a deferred-sentencing agreement (DSA). Under the DSA that was offered, in return for pleading guilty to the charge of failure to obey a lawful order, the government agreed to dismiss each of the protestors' cases if, for a four-month period, each refrained from being arrested upon probable

[1] If convicted, the defendant faces up to six months in jail and a maximum fine of $500. 36 C.F.R. § 1.3 (2011) and 16 U.S.C. § 3 (2011). Pursuant to 18 U.S.C. §§ 19 and 3559, this offense is a Class B misdemeanor, a petty offense. Thus, the defendant is not entitled to a jury trial, and he may be tried before a United States Magistrate Judge (USMJ) in a bench trial.

cause and complied with all other conditions set by the magistrate court. All of the protestors except for defendant Choi accepted the DSAs, and the government is today filing motions to dismiss their cases.

A few days before trial was to begin, the United States again attempted to reach a resolution of the case with defendant Choi by offering him a deferred-prosecution agreement (DPA) under which, if he were to refrain from being arrested upon probable cause and comply with all release conditions set by the magistrate court for a period of four months, the government would dismiss the criminal complaint. Choi declined this offer.

Trial commenced before United States Magistrate Judge John M. Facciola on August 29, 2011. The week before trial began, the Assistant United States Attorney assigned to this case, Angela George, became aware through a telephone conversation with defense counsel that the defendant might seek to assert a selective-prosecution claim based on dissimilar treatment between the defendant and members of the public who spontaneously gathered outside the White House the night that President Barack Obama announced that Osama bin Laden had been killed. Because there is no indication that these revelers handcuffed themselves to the White House fence or refused to obey a lawful order, and because "[a] selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution," United States v. Armstrong, 517 U.S. 456, 463 (1996), the United States filed a pretrial motion in limine to preclude the defense from raising this selective-prosecution claim during the trial (App. A at 7-12).[2] The government argued that the defendant had waived a selective-prosecution claim by failing to raise it in a pretrial motion to dismiss the

[2] "App." refers to the Appendix of pertinent record materials filed with this petition.

complaint, pursuant to Rule 12(b)(3)(A) & (b)(3)(E) of the Federal Rules of Criminal Procedure, and that he therefore should be precluded from eliciting evidence regarding selective prosecution at trial (App. A at 7-8). The government also argued that the defendant had proffered no evidence that the defendant was singled out for prosecution from among others who were similarly situated, nor had the defendant proffered any evidence of discriminatory intent (App. A at 9-10).

Before trial began on the morning of August 29, the prosecutor asked for a ruling on the in limine motion, again arguing that a claim of selective prosecution is not a trial defense and, if raised by the defendant, should be addressed pretrial (8/29/11 a.m. Tr. 4-5). The magistrate court declined to rule on the motion, and directed the prosecutor to call her first witness (id. at 5). The magistrate court thereafter allowed the defense to elicit testimony from U.S.P.P. witnesses purportedly in support of a claim of selective prosecution and, on August 31, 2011, sua sponte indicated that a prima facie case of selective prosecution had been made out (8/31/11 a.m. Tr. 8). The USMJ later clarified that he viewed the issue as one of vindictive prosecution rather than selective prosecution, based on the fact that Choi had been prosecuted in federal court after his November 15, 2010, arrest, but had not been prosecuted federally after either of his two earlier arrests, which occurred in March and April of 2010 (8/31/11 p.m. Tr. 2-3). According to the USMJ, this raised the inference that the instant prosecution was based on the nature of Choi's speech (id. at 3). The USMJ also stated that he would allow the defense to pursue this claim of vindictive prosecution as a trial defense (id.).

Although this petition is being brought because of the magistrate court's legal error in considering selective and vindictive prosecution as defenses to the charge of failure to obey a lawful order, the United States Attorney's Office also strongly disagrees that any claim of selective or vindictive prosecution can be made out in this case. Defendant Choi has yet to offer any evidence

that he was treated differently than any person who has handcuffed himself to the White House fence and refused to obey a police order to leave. There is no indication that the members of the public who celebrated the death of Osama bin Laden outside the White House and were not arrested had ever chained themselves to the White House fence. The people most similarly situated to Choi are the 12 others with whom he was arrested, each of whom were charged with the same offense as Choi, and each of whom entered into the same DSA that was offered to Choi. Indeed, the DPA that the government later offered to Choi was more favorable than a DSA because it did not require Choi to plead guilty.

Nor is there any merit to the magistrate court's preliminary finding of a prima facie case of vindictive prosecution. The fact that Choi was arrested in March and April based on the same conduct that led to his arrest in November, but was not prosecuted in federal court on either of the two previous occasions, does not raise the inference that he was prosecuted vindictively based on the nature of his speech.[3] Each arrest was made during a DADT protest, in which the subject matter of the protest was the same. It is well within the broad discretion afforded the prosecutor to bring any charges for which probable cause exists against a person who has three times in nine months engaged in the same illegal conduct.

The government seeks a writ of mandamus because the magistrate court clearly erred by: (1) failing to rule on the government's motion in limine seeking to preclude evidence of selective prosecution where the defense had filed no motion under Rule 12(b)(3)(A); (2) permitting the defense to pursue selective prosecution as a defense to the charge of failing to obey a lawful order

[3] This is particularly true given the fact that the March and April prosecution decisions were made by the D.C. Office of Attorney General rather than the U.S. Attorney's Office.

at trial; and (3) sua sponte raising vindictive prosecution as a defense to the criminal charge. The magistrate court's consideration of either selective prosecution or vindictive prosecution as a defense to the charge of failure to obey a lawful order is clear error for which no adequate remedy other than mandamus exists. Although the government has a statutory right to appeal the dismissal of criminal charges under 18 U.S.C. § 3731, the availability of that remedy has been infringed by the USMJ's decision to consider selective and/or vindictive prosecution as a trial defense after jeopardy attached, rather than as a pretrial challenge to the constitutionality of the prosecution. Because the government's right to mandamus relief is "clear and indisputable" and "no other adequate means to attain the relief exist[s]," In re Sealed Case, 151 F.3d 1059, 1063 (D.C. Cir. 1998) (internal quotations and citations omitted), the government requests this Court to order the magistrate court to: (1) refrain from considering selective or vindictive prosecution as a defense to the charge of failure to obey a lawful order; (2) preclude any further evidence in support of a claim of selective or vindictive prosecution at trial; (3) deny as waived any motion to dismiss that the defense may file mid-trial or post-trial based on selective or vindictive prosecution; and (4) refrain from sua sponte consideration of dismissal based on selective or vindictive prosecution either mid-trial or post-trial.

JURISDICTION

This Court has jurisdiction over the government's petition for writ of mandamus pursuant to the All Writs Act, 28 U.S.C. § 1651 (2011). Additionally, where the writ is sought with regard to a ruling of a magistrate court, it is the procedural practice in this jurisdiction as well as others to file the petition in the District Court. See Washington Post v. Robinson, 935 F.2d 282 (D.C. Cir. 1991) (considering appeal from district court's denial of petition for writ of mandamus to magistrate judge); U.S. v. Lee, 786 F.2d 951 (9th Cir. 1986) (same).

STATEMENT OF FACTS

At approximately 12:45 p.m., on November 15, 2010, in the area of Lafayette Park and the 1600 block of Pennsylvania Avenue, N.W., Washington, D.C., defendant and 12 other individuals, who were dressed in civilian clothes and Army, Navy, and Air Force military uniforms, formed a group on the north side of Lafayette Park. Lafayette Park is located between the 1600 block of H Street, N.W. and Pennsylvania, Avenue, N.W., north of the White House. The individuals walked in pairs side by side through Lafayette Park, crossed Pennsylvania Avenue, and continued to walk onto the White House sidewalk. The individuals then stepped up onto the masonry base at the bottom of the White House fence and each affixed himself or herself with metal handcuffs to the White House fence, forming a single line across the center of the White House fence. After each was affixed to the White House fence, U.S. Park Police (U.S.P.P.) officers closed the White House sidewalk with police line tape, securing the center portion of the White House sidewalk.[4]

Then, using a loudspeaker, Lieutenant LaChance, of the U.S.P.P., gave verbal warnings. He informed the group that it was violating the regulations applicable to the White House sidewalk and ordered the group to leave. Lieutenant LaChance stated that if they failed to leave the area, the members of the group would be arrested. To ensure that all of the members of the group were in a position to hear the warnings, a U.S.P.P. officer was assigned to the east and west ends of the line the defendants formed. Lieutenant LaChance, with a loudspeaker, stated the warnings three times successively in three minute intervals. Each officer posted at either end of the group indicated that

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[4] U.S. Park Police officers have the legal authority to maintain law and order and protect persons and property within areas of the National Park System. The White House and its grounds have been part of the National Park System in Washington, D.C., since 1933. D.C. Code §§ 5-201, 10-104.

he could hear the warnings. None of the members of the group who were affixed to the fence attempted to comply with Lieutenant LaChance's order. U.S.P.P. officers allowed additional time to elapse to determine if any member of the group was going to comply with the order. The members of the group remained affixed to the fence.

During the demonstration, the members of the group chanted. There was one individual from the group who was not affixed to the fence. He had a bull horn and was speaking simultaneously with the others who were demonstrating. They engaged in this conduct to protest the United States military's "Don't Ask, Don't Tell" policy regarding a military service person's sexual orientation. The group chanted phrases such as "I am somebody," "I was court marshaled," "I represent all of those who were court marshaled for being who they are," "Where's the change, Mr. Obama, stand up." Additionally, when prompted by the individual with the bull horn, each member of the group stated his/her name and rank.

After it became apparent that the members of the group had no intention of complying with Lieutenant LaChance's order, U.S.P.P. officers, equipped with bolt cutters, began to separate each person from the White House fence by cutting each set of handcuffs. As this was done, each member of the group refused to comply with the arrest procedure and refused to walk from the masonry base to the processing area. As a result, the officers assisted some of the members of the group by preventing them from hitting the ground and injuring themselves. Other officers had to carry some of the members of the group from the masonry base to the processing area. They were arrested for failure to obey a lawful order, in violation of 36 C.F.R. § 2.32(a)(2). Each member of the group was taken into custody and transported to the U.S.P.P. District 5 Substation, where each was positively identified by an arresting officer. The members of the group were detained until it

was determined that they would be released to return to court for an initial appearance on a later date. The U.S.P.P. issued each defendant a violation notice for failure to obey a lawful order, pursuant to 36 C.F.R. § 2.32(a)(2), with a mandatory court appearance of December 15, 2010.

PROCEDURAL HISTORY

Shortly after the protestors' arrests on November 15, 2010, government counsel was contacted by defense counsel Mark Goldstone, Esq., who stated that he, along with Ann Wilcox, Esq., represented all 13 defendants, and he was interested in resolving the case. The parties discussed continuing the initial appearance, which was set for December 15, 2010, in order to pursue a resolution. To facilitate this, on November 30, 2010, the government filed a criminal complaint, joining all defendants as co-defendants and charging them with failure to obey a lawful order, pursuant to the Code of Federal Regulations (C.F.R.) (App. B). On December 2, 2010, to correct an error in the C.F.R. citation, the government filed an amended criminal complaint (App. C). On December 8, 2010, based upon the above conversation with defense counsel, the parties filed a joint motion to continue the initial appearance, requesting that the initial appearance be converted to a status hearing. The magistrate court granted the motion and converted the initial appearance to a status hearing to discuss a mutually convenient date for the parties and the magistrate court. On December 15, 2010, the case was continued to March 18, 2011.[5]

On March 18, 2011, the case was called for an initial appearance. All defendants, except Ian Finkenbinder, appeared with defense counsel Mark Goldstone and Ann Wilcox. Each defendant was arraigned and pled not guilty. Because Mr. Goldstone and Ms. Wilcox stated that they jointly

[5] Defense counsel and the government agreed that the defendants' presence could be waived for the status hearing.

represented all defendants, the government, prior to the hearing, filed a motion requesting that the magistrate court conduct an inquiry pursuant to Rule 44 of the Federal Rules of Criminal Procedure (Right to and Appointment of Counsel). Pursuant to that motion, the magistrate court conducted a Rule 44 inquiry, and each defendant waived his or her right to single representation and consented to joint representation. Defense counsel Goldstone informed the magistrate court that the government and his clients had come to an impasse regarding whether the case could be resolved before trial. The magistrate court encouraged the government to consider offering the defendants the opportunity to plead guilty to disorderly conduct pursuant to the D.C. Code. The magistrate court recessed, and during this recess, the government consulted with U.S. Attorney's Office and D.C. Office of Attorney General management personnel, and it was determined that the government, based upon the facts known to it at that time, could not agree that the facts supported a charge of disorderly conduct under the D.C. Code. The government agreed to continue its efforts to reach a pretrial resolution. The magistrate court placed each defendant on personal recognizance and ordered them all to return on May 17, 2011, for a status hearing. In the meantime, government counsel and defense counsel Goldstone and Wilcox worked diligently to come to a mutual agreement regarding a plea offer. These efforts included considering whether the defendants could plead guilty to a violation of the D.C. Municipal Regulations or the D.C. Code, or to an offense pursuant to the Code of Federal Regulations. In April 2011, the parties reached a resolution. The government offered a deferred-sentencing agreement (DSA) to all 13 defendants. Specifically, the government agreed to dismiss the case if the defendants pleaded guilty to failure to obey a lawful order and complied with two conditions during a four-month period: (1) refrain from being arrested upon probable cause and (2) comply with all conditions set by the magistrate court. Via email, defense

counsel informed the government that all defendants, including defendant Choi, had accepted the DSA offer.

On May 10, 2011,[6] each defendant, except defendant Daniel Choi, pleaded guilty to failure to obey a lawful order pursuant to a DSA with the government.[7] Defendant Choi appeared with new counsel, Yetta Kurland for Christopher Lynn, and did not enter a DSA. The magistrate court granted an oral motion by Mr. Goldstone and Ms. Wilcox to withdraw as defendant Choi's counsel. The magistrate court set a status date for June 14, 2011, to allow new defense counsel an opportunity to enter his notice of appearance and discuss a mutually agreeable trial date. On June 14, 2011, the case was called for status, and the parties selected a trial date of August 29, 2011. Defendant Choi was continued on personal recognizance and ordered to return to court on the next date.

In the process of preparing for trial, government counsel began to prepare discovery and noticed that defense counsel Lynn had not made a formal request for discovery pursuant to Rule 16 of the Federal Rules of Criminal Procedure. On July 6, 2011, to clarify the issue, government counsel emailed Mr. Lynn requesting that he simply respond to her email with a formal request for Rule 16 discovery to satisfy the requirements of Rule 16. Mr. Lynn, on behalf of Mr. Choi, responded that Mr. Choi "deliberately did not file any pretrial motions in this matter" (App. D). Despite this apparent strategic decision, the government provided discovery on August 12, 2011, via email and Federal Express (App. E). On August 16, 2011, defense counsel Lynn acknowledged that

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[6] Defense counsel Goldstone mistakenly told the defendants the case was set for May 10, 2011, instead of May 17, 2011. USMJ Facciola was not available on May 10, 2011. Due to his unavailability, he made arrangements with USMJ Kay to conduct the status hearing.

[7] As noted above, the government is today moving to dismiss the cases of the 12 other protestors, each defendant having successfully complied with the terms of his or her DSA.

he had received the video of the alleged events (App. F). Then, on August 22, 2011, undersigned counsel received an email from Mr. Lynn, informing the government that two new attorneys, Robert Feldman, Esq. and Norm Kent, Esq., would enter their appearances on behalf of Mr. Choi (App. G). Mr. Lynn, in a voice-mail message, further elaborated on why Mr. Choi selected new counsel. Mr. Lynn stated that he was "out of the case" because Mr. Choi disagreed with his strategy to move to dismiss the case based upon a Speedy Trial Act (STA) violation.[8]

On August 24, 2011, in a telephone conversation with government counsel, Mr. Feldman stated that he was planning to introduce at trial photographs of individuals in front of the White House celebrating the death of Osama bin Laden.[9] When undersigned counsel raised questions about their authenticity and inquired about their relevance, Mr. Feldman stated that the defendant would be claiming that the government selectively prosecuted him because of his sexual orientation and his Anti-Obama perspective.[10] On August 25, 2011, at the request of defense counsel, the case was called for a status conference before U.S. Magistrate Judge Facciola. The defendant was not present, and defense counsel appeared via telephone. Addressing the issue of the White House photographs, the magistrate court took judicial notice of the fact that the building depicted in the photographs was the White House, and ruled that the photographs therefore would be considered

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[8] In his August 22, 2011, email, Mr. Lynn alluded to this strategy. He asked government counsel if she would concede an STA violation, implying the case was set for trial outside the alleged required 70-day time period (App. G).

[9] In this conversation, Mr. Feldman described the photographs and promised to email them to the government. However, the government did not receive any photographs via email. Mr. Feldman delivered the photographs directly to the magistrate court's chambers. The government received a copy in court from the law clerk on August 25, 2011.

[10] Before this conversation, the government had not received any notification, oral or written, that the defendant intended to advance a claim of selective prosecution.

authenticated, but also ruled that the government could argue that the photographs were irrelevant (8/25/11 Tr. 6-7). The prosecutor then noted that, pursuant to Rule 12(b)(3)(A) of the Federal Rules of Criminal Procedure, to pursue a claim of selective prosecution, the defense was required to file a pretrial motion (id. at 7). The USMJ responded, ". . . [y]our objection will be reserved, and . . . I will consider it when I try the case" (id. at 7). Later during the status hearing, when the government returned to the selective-prosecution issue, inquiring whether the parties would litigate it, the USMJ stated "I will hear, at the conclusion of the case, any legal arguments anyone wishes to make; one of which I take it will be that in prosecuting Mr. Choi but not prosecuting these demonstrators, the government is engaging in selective prosecution in violation of the Fifth Amendment" (id. at 10-11).

On Friday, August 26, 2011, government counsel contacted Mr. Feldman to discuss a possible disposition of the case. In two telephone conversations and an email, the government extended the following deferred-prosecution offer: if the defendant, for a period of four months, agreed to: (1) refrain from being arrested upon probable cause, and (2) comply with all release conditions set by the magistrate court, the government would dismiss the complaint. Through counsel, the defendant declined the offer.

On August 28, 2011, the government filed a motion in limine asking the magistrate court to limit the scope of testimony and evidence regarding the subject matter of the protest, preclude a claim of selective prosecution, and preclude the defense of impossibility (App. A). Relying on United States v. Armstrong, 517 U.S. 456 (1996), and United States v. Washington, 705 F.2d 489 (D.C. Cir. 1983), the government argued in its motion that selective prosecution is not a defense, but a challenge to the constitutionality of the prosecution, and, as such, must be brought by pretrial motion to dismiss the complaint under Rule 12(b)(3)(A) of the Federal Rules of Criminal Procedure

(App. A, at 7-8). The government further argued that, because the defendant failed to file a pretrial motion to dismiss the complaint, the issue was waived under Rule 12(b)(3)(E) (id at 8). Because selective prosecution is not a defense, and relates to an issue of law independent of the guilt of the accused, the government argued that Choi should be prohibited from introducing evidence of selective prosecution at trial (id. at 7-8). The government also argued that the defendant's proffered photographs of people celebrating outside the White House after Osama bin Laden's death did not support a claim of selective prosecution (id. at 9-10).

The case was set for trial on Monday, August 29, 2011. When the USMJ took the bench that morning, without addressing the government's motion, he directed government counsel to "call your first witness" (8/29/11 a.m. Tr. 4). Government counsel asked if the magistrate court would resolve the motion in limine before proceeding to trial, (id. at 4), and pointed out that, in addition to the request to preclude an impossibility defense, the motion also sought to preclude evidence of selective prosecution (id. at 5). The following exchange then occurred:

> THE COURT: I saw [the motion in limine] for a few moments when I read it, but – all right, as I understood it, you were objecting, as you did on the telephone conversation we had last week, that any claim of selective prosecution was insufficient, as a matter of law, because you can't show he was singled out upon a basis that falls within the scope of the 5th and 14th Amendments.
>
> Now, that would go to his defense, right?
>
> MS. GEORGE: No. Actually, Your Honor, the case law indicates that it is not a defense.
>
> THE COURT: That's what I'm saying. But unless and until we get to your making out a prima facie case of his guilt, why are his defenses at all relevant at this point in the process?
>
> MS. GEORGE: Because the claim of selective prosecution is not a defense at all.

THE COURT: He will get to that when he gets to his defenses. You have to prove him guilty first.

MS. GEORGE: Yes, Your Honor, but the motion addresses whether defense counsel can ask questions in the government's case --

THE COURT: Why don't you wait until the questions are asked so we can have it in context?

MS. GEORGE: The defense has already said he wants to ask the questions.

THE COURT: I asked you to call the first witness.

MS. GEORGE: Can I have a little indulgence?

THE COURT: Not now. No, you can't. We'll get to it when we get to it. Please call your first witness. (8/29/11 a.m. Tr. 5-6.)

During the trial, the defense was permitted to cross-examine government witnesses regarding the selective-prosecution claim he alluded to pretrial, but never established that defendant Choi had been treated differently from other similarly situated individuals. See, e.g., 8/29/11 p.m. Tr. 30-32 (questioning Lieutenant LaChance about whether anyone was arrested at the White House on the night that the President announced that Osama bin Ladin was dead); 8/29/11 p.m. Tr. 55-58 (questioning Lieutenant LaChance about Choi's arrest a week before trial for protesting in front of the White House with a group of environmentalists opposed to an oil pipeline, for which he was issued a summons to appear in Superior Court, and asking, at 58, "So, let me get this straight. Through environmental stuff, these guys get a ticket, but for gay stuff, they have to go through the system and face federal charges and up to six months in jail, true or false?") ; 8/29/11 p.m. Tr. 69 (questioning Lieutenant LaChance about whether the U.S.P.P. arrested a lady in red, who appeared on the video of the arrest of the DADT protestors, but was not with the protestors and was outside the perimeter established by the U.S.P.P., using an amplification device to talk about "Jesus," and

arguing in response to the government's relevance objection, that it was relevant "to selective prosecution"); 8/29/11 p.m. Tr. 93 (asking U.S.P.P. Officer Michael Fermaint, who was involved in the arrest of the protestors on November 15, 2010, how many protest arrests he had been involved in; USMJ following up by asking whether officer had ever been in a situation where a demonstration led to arrests prosecuted in Superior Court and not federal court); 8/29/11 p.m. Tr. 134 (asking U.S.P.P. Jerome Stoudamire, who was involved in the arrest of the protestors on November 15, 2010, out of all of the arrests of protestors in which he had participated, how many were prosecuted in federal court). Defense counsel was also permitted to ask U.S.P.P. officers called in the defense case questions related to selective prosecution. See 8/31/11 a.m. Tr. 37 (asking U.S.P.P. Captain Philip Beck why the instant case was not prosecuted in Superior Court); 8/31/11 p.m. Tr. 41-42, 45 (asking Captain Beck about an arrest of a woman for dousing herself with gasoline, and about the rally the night that Osama Bin Laden was killed).

At times, the USMJ himself asked questions related to a selective-prosecution or vindictive-prosecution claim. See, e.g., 8/29/11 p.m. Tr. 57 (asking Lieutenant LaChance about the nature of the protest the week before trial, during which protestors were arrested and issued a summons to appear in Superior Court); 8/29/11 p.m. Tr. 84 (asking USPP Officer Fermaint what he was told in advance about the demonstrators, and explaining, "I want to see the selective prosecution question."); 8/31/11 a.m. Tr. 37-38 (questioning U.S.P.P. Captain Beck about who made the decision to prosecute Choi in Superior Court in March and April).[11] The USMJ also continued to indicate that he would allow the defendant to argue selective prosecution as a defense to the charge against him.

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[11] Captain Beck testified that the D.C. Attorney General's Office, and not the U.S. Attorney's Office, made the charging decisions in March and April because Choi was charged with a violation of the D.C. Municipal Regulations (8/31/11 a.m. Tr. 38)

See 8/29/11 p.m. Tr. 133 (explaining that after the government rests, "the Defendant will decide whether to present the defense of these charges or otherwise try to defend himself. He may choose selective prosecution, he may deny his guilt, he may choose whatever defense he wishes to.")

During the defense case, Choi testified that he had been arrested for DADT protests in March and April of 2010, that he had appeared in "Municipal Court," and that he had been ordered to stay away from the White House (8/31/11 a.m. Tr. 63).

At the beginning of the third day of trial, while in the defense case, the magistrate court addressed a "Motion to Compel Production," filed by Choi's counsel the previous night (App. H). The motion asserted, as grounds for the requested discovery that "the defendant . . . has asserted that the government may have acted vindictively and with animus towards the above named Defendant" (App. H at ¶ 3); and "[t]hat to prove a claim of selective prosecution the Defendant is prepared to show that other protestors on the White House sidewalk, similarly situated, have been disparately treated" (App. H at ¶ 4). The motion sought production of email communications between the U.S. Secret Service and the U.S. Park Police advising the Park Police that there was going to be a demonstration at which people were planning to chain themselves to the White House fence (App. H at ¶ 11 ; 8/29/11 a.m. Tr. at 49-52).[12] The motion asserted that this email and others "may be probative of the defendant's theory of this case, to wit, that he may have been selectively targeted

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[12] The email, marked for identification as government's exhibit 24, but not introduced into evidence, had been mentioned during direct examination of Lieutenant LaChance, the Park Police officer who was assigned as SWAT commander on November 15, 2010 (8/29/11 a.m. Tr. 47). When asked if he had received information that there was going to be a demonstration at the White House that day, LaChance testified that he had received an email from the Secret Service advising him that the demonstration would involve people who were going to chain themselves to the White House fence (id. at 49-52). Based on this information, LaChance reported to the White House sidewalk (id. at 53). The email mentioned by Lieutenant LaChance is included in the Appendix at Tab I.

due to bad faith, ill will of government agents extending from the arresting officers of the US Park Police to the Secret Service to representatives of the President of the United States" (App. H at ¶ 9). After announcing that he would give the government time to oppose the motion, the USMJ told government counsel that he "just had a thought that [he] would appreciate if [she] would convey to the people in the U.S. Attorney's Office" (8/31/11 a.m. Tr. 8). The USMJ then stated, "I believe that a prima facie case of selective prosecution has been made out, and this material under Rule 16 is relevant, but now the question becomes what, if any, privileges you intend to assert" (id.).[10] Later in the day, the USMJ elaborated:

> At the end of these proceedings, assuming they ever end, I'm going to ask for briefs from both sides so we can shape the issues, and Mr. Kent can speak for his client, but as I understand Lieutenant [Choi's] testimony, it was that, not that other people who demonstrated about whales or environmental issues or anything else. His claim of selective prosecution is that after I did something in March and I did it in April, they began to form the decision to treat me radically different in November. They did that to punish me for the expression of my First Amendment rights, and therefore that was to be selectively prosecuted, to be vindictively prosecuted because of the content of what I was saying. (8/31/11 a.m. Tr. 67.)

After a break for government counsel to confer with others in the U.S. Attorney's Office, the proceedings recommenced and government counsel asked if the magistrate court would clarify whether it was considering selective or vindictive prosecution as a theory of defense, and was going to allow the defense to proceed as if it was a theory of defense, or whether the magistrate court was contemplating considering a motion to dismiss at the end of the government's case (8/31/11 p.m. Tr.

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[10] The magistrate court's reference to Rule 16 was erroneous. In United States v. Armstrong, 517 U.S. 456, 463 (1996), the Supreme Court held that Rule 16 governs discovery of documents material to the preparation of a defense against the government's case, but not to the preparation of a selective-prosecution claim. To obtain discovery in preparation of a selective-prosecution claim, a defendant must produce some evidence that similarly situated defendants of other races, religions, or other arbitrary classifications could have been prosecuted, but were not. Id. at 469.

2). The USMJ responded:

> The issue presented by the testimony of the defendant yesterday in my view creates a prima facie case for the proposition that the difference in the manner in which he was prosecuted for his behavior in November as opposed to his behavior in March and April would permit the inference that that difference was a function of the nature of his speech or what he said.
>
> It would then follow that the difference in treatment would (a) violate the due process clause because it is vindictive; and (b) independently constitute a violation of the First Amendment because it is predicated on his speech. I, therefore, will permit both sides to elicit evidence as to the difference in his treatment on those three occasions. (8/31/11 p.m. Tr. 2-3.)

Again seeking clarification, government counsel asked if the defense was going to be allowed to pursue the theory posited by the magistrate court as a theory of defense, and the USMJ responded "[y]es" (8/31 p.m. Tr. 3). Government counsel argued that the defense should not be allowed to pursue vindictive prosecution as a defense on the merits (id. 4), and, when asked by the USMJ how the government was prejudiced, responded that vindictive prosecution is a claim that there is a constitutional infirmity in the decision the government made to prosecute, which should be handled in a separate hearing and, if the magistrate court concludes that the prosecution is vindictive, should result in the dismissal of the case (id. at 5-6). The USMJ then acknowledged that, if the issue had been addressed pretrial, and the magistrate court had dismissed the complaint on the grounds of vindictive prosecution, the government would have been able to appeal the dismissal (id. at 6). The USMJ further acknowledged that the government only became aware of the potential argument during the pretrial phone call with the defense counsel, but then suggested that the government "could have at that point asked me, because selective prosecution was raised, to continue the proceeding so that issue could be addressed. But we all went forward. I don't know how else we could have done what we did." (Id. at 6-7.) The government made two points in response: first, that

the first time vindictive prosecution was raised was when it was raised by the magistrate court that morning, and second, that the government preserved its position on selective prosecution when it filed the motion in limine (id. at 7-8). Recognizing that jeopardy had attached, the USMJ asked if the government wished the magistrate court to stop the proceeding so the government could seek mandamus, and government counsel responded affirmatively (id. at 8). The USMJ granted the government's request to stay the proceedings, denied an oral defense motion to dismiss the case under Rule 48(b)(3), and gave the government 10 days within which to file a written petition for writ of mandamus (id. at 18). Defendant remains on personal recognizance.

SUMMARY OF ARGUMENT

The magistrate court's failure to rule on the government's motion in limine regarding selective prosecution, and its consideration of selective or vindictive prosecution as a defense to the charge of failure to obey a lawful order, are contrary to Rule 12 of the Federal Rules of Criminal Procedure and controlling federal case law, and are thus clear errors for which no adequate remedy other than mandamus exists. Although the government has a statutory right to appeal the dismissal of criminal charges under 18 U.S.C. § 3731, the availability of that remedy has been infringed by the magistrate court's decision to consider selective and/or vindictive prosecution as a trial defense, rather than as a pretrial challenge to the constitutionality of the prosecution. Because the government's right to mandamus relief is "clear and indisputable" and "no other adequate means to attain the relief exist," In re: Sealed Case, 151 F.3d 1059, 1063 (D.C. Cir. 1998) (internal quotations and citations omitted), the government requests this Court to order the magistrate court to: (1) refrain from considering selective or vindictive prosecution as a defense to the charge of failure to obey a lawful order; (2) preclude any further evidence in support of a claim of selective or vindictive

prosecution at trial; (3) deny as waived any motion to dismiss that the defense may file mid-trial or post-trial based on selective or vindictive prosecution; and (4) refrain from sua sponte consideration of dismissal based on selective or vindictive prosecution either mid-trial or post-trial.

ARGUMENT

WRIT OF MANDAMUS LEGAL STANDARD

The writ of mandamus has been described as "an extraordinary remedy, to be reserved for extraordinary circumstances." Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988). Mandamus will issue if the petitioner establishes that: (1) the right to issuance of the writ is "'clear and indisputable,'" In re Sealed Case, 151 F.3d at 1063 (quoting Gulfstream, 485 U.S. at 289), and (2) "'no other adequate means to attain the relief' exist." Id. (quoting Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 35 (1980).

THE MAGISTRATE COURT ERRED BY FAILING TO RESOLVE THE GOVERNMENT'S MOTION IN LIMINE BEFORE TRIAL AND BY CONSIDERING THE CLAIMS OF SELECTIVE AND VINDICTIVE PROSECUTION AS TRIAL DEFENSES.

A. Selective prosecution and vindictive prosecution are not defenses to a criminal charge, and must be brought by pretrial motion absent exceptional circumstances.

"A selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution." United States v. Armstrong, 517 U.S. 456, 463 (1996). Similarly, a vindictive prosecution claim is not a defense to the merits of a charged offense because it also is a claim that the prosecutor has violated the defendant's constitutional rights by the institution of the prosecution. U.S. v. (Jerry) Jarrett, 447 F.3d 520, 525 (7th Cir.) (quoting Armstrong, 517 U.S. at 463 (1996)),

cert. denied, 549 U.S. 1043 (2006). Both selective-prosecution claims and vindictive-prosecution claims "relate[] to an issue of law entirely independent of the ultimate issue of whether the defendant actually committed the crimes for which she was charged." United States v. Washington, 705 F.2d 489, 495 (D.C. Cir. 1983).

A selective-prosecution claim asks the court to exercise judicial power over the prosecutor's otherwise broad discretion to enforce the nation's criminal laws based on a claim that the prosecution violates the equal protection component of the Due Process Clause of the Fifth Amendment. Armstrong, 517 U.S. at 464. See also Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute . . . generally rests entirely in his discretion"). A selective-prosecution claimant must demonstrate that the federal prosecutorial policy "had a discriminatory effect and that it was motivated by a discriminatory purpose." Id. at 465 (quotation and citation omitted).

A vindictive-prosecution claim asks the court to preclude, as a matter of due process, action by a prosecutor that "is designed to penalize a defendant for invoking any legally protected right available to a defendant during a criminal prosecution." United States v. Safavian, 2011 WL 1812348 *3 (D.C. Cir. 2011) (quoting Maddox v. Elzie, 238 F.3d 437, 446 (D.C. Cir.), cert. denied, 534 U.S. 836 (2001)). To prove prosecutorial vindictiveness, a defendant must submit either "(i) evidence of the prosecutor's actual vindictiveness or (ii) evidence sufficient to establish a 'realistic likelihood of vindictiveness,' thereby raising a presumption the Government must rebut with objective evidence justifying its action." Id. (quoting United States v. Meyer, 810 F.2d 1242, 1245 (D.C. Cir. 1987)). If a defendant is successful in convincing a court that the government engaged

in selective or vindictive prosecution, violating his due process rights, then the charging document should dismissed.

Permitting a defendant to present selective prosecution or vindictive prosecution as a trial defense to the charged crime is legal error. Evidence of selective or vindictive prosecution is irrelevant to the elements of the charged offense. See Washington, 705 F.2d at 495 (rejecting claim that selective prosecution should have been decided by jury and not by trial court); (Jerry) Jarrett, 447 F.3d at 525 (reversing district court's dismissal of indictment based on prosecutorial vindictiveness after de novo review). Evidence that the prosecutor has unconstitutionally initiated the prosecution does not bear on the credibility of the fact witnesses or the weight of the evidence. It does not tend to prove or disprove whether the defendant committed the charged crime. See United States v. Lopez, 854 F. Supp. 57, 60 (D.P.R. 1994) (evidence alleged in defendant's motion claiming selective prosecution "has no bearing whatsoever on whether the defendant committed the crimes alleged, and will not be allowed at trial").

Rule 12(b)(3)(A) of the Federal Rules of Criminal Procedure states that "a motion alleging a defect in instituting the prosecution" "must be raised before trial." A motion required to be made before trial under Rule 12(b)(3) is waived unless, for good cause shown, the court grants relief from the waiver. Fed. R. Crim. P. 12(e). Because a selective- or vindictive-prosecution claim alleges "a defect in instituting the prosecution," Fed. R. Crim. P. 12(b)(3)(A), it must be raised by motion before trial or it is waived. See U.S. v. Gary, 74 F.3d 304, 313 (1st Cir.) (absent "exceptional circumstances," "a claim of selective prosecution that is not raised prior to trial is deemed waived"), cert. denied, 518 U.S. 1026 (1996); U.S. v. Taylor, 562 F.2d 1345, 1356 (2nd Cir.) (selective-prosecution claim made after five weeks of trial untimely because it alleged a defect in the institution

of the prosecution, which must be raised before trial under Rule 12), cert. denied, 432 U.S. 909 (1977); (Ronald) Jarrett v. United States, 822 F.2d 1438, 1442 (7th Cir. 1987) (Rule 12(b) requires motions alleging selective or vindictive prosecution to be made pretrial or they will be deemed waived; reviewing whether trial counsel was ineffective for failing to file pretrial motion; and concluding there was no ineffectiveness because any such motion lacked merit).

Defendant Choi did not file a pretrial motion alleging selective or vindictive prosecution, nor has he filed such a motion during the trial. The defendant has known, at least as early as August 24, 2011, when he raised the issue in a telephone call with government counsel, that he intended to raise a selective-prosecution claim. He has also known since November 30, 2010, when the government filed a criminal complaint, that he was being prosecuted for his actions on November 15, 2010, even though he had not been prosecuted for similar actions in March and April 2010. Yet he failed to comply with Rule 12 by filing a pretrial motion alleging either selective or vindictive prosecution. Even if the Motion to Compel could be considered a motion to dismiss the indictment on either ground, it is untimely. The defendant waived his right to raise selective- or vindictive-prosecution claims by failing to comply with Rule 12. Gary, 74 F.3d at 313. He should not have been permitted by the magistrate court to avoid the rule's requirements by asserting the claims as trial defenses.

A plain reading of Rule 12(b)(3)(A) reveals that one of its primary goals is to enable the court to resolve challenges to the constitutionality of the prosecution before trial. Because a selective- or vindictive-prosecution claim challenges the broad discretion of the Attorney General and United States Attorneys, "'in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.'" Armstrong, 517 U.S. at 464 (quoting United States v. Chemical Foundation, Inc., 272 U.S. 1, 14-15 (1926)). This is a "demanding" standard, id. at 463,

and the Supreme Court has established a likewise demanding standard to obtain discovery in support of such a claim. Id. at 468 ("The justifications for a rigorous standard for the elements of a selective-prosecution claim thus require a correspondingly rigorous standard for discovery in aid of such a claim."); id. at 470 (requiring some evidence that similarly situated defendants could have been prosecuted, but were not, based on race, religion, or other arbitrary classification, before discovery may be ordered). Thus, as Supreme Court precedent and Rule 12(b)(3)(A) contemplate, a successful claim of selective or vindictive prosecution must be brought to the court's attention pretrial so that it can be fully developed – through discovery and an evidentiary hearing, if warranted – and ruled upon before putting the defendant in jeopardy.

In this case, the United States had only vague notice, provided during a telephone call, of the gravamen of the defendant's claim. When no pretrial motion to dismiss the complaint was filed, and no discovery requested, the government became concerned that the defendant intended to raise the issue at trial as a defense to the charge of failure to obey a lawful order. That is why the government filed the motion in limine, but the magistrate court refused to consider the motion, and instead directed the government to begin presenting its trial evidence, thus causing jeopardy to attach. The magistrate court's later confirmation that it would consider selective prosecution (recharacterized by the magistrate court as vindictive prosecution) as a defense to the charge of failure to obey an unlawful order was clearly erroneous.

B. The United States will be irreparably harmed if the magistrate court acquits the defendant on the basis of selective or vindictive prosecution, thereby depriving the government of its statutory appellate rights.

Under 18 U.S.C. § 3731, the government has a statutory right to appeal the dismissal of

criminal charges. It has no such right to appeal an acquittal. See Yeager v. United States, 129 S. Ct. 2360, 2366 (2009) (Double Jeopardy Clause precludes government from relitigating any issue necessarily decided by factfinder's acquittal in prior trial). Although we do not believe there is any merit to the vindictive-prosecution claim, if the magistrate court considers vindictive prosecution as a defense to the charge of failure to obey a lawful order – as it has indicated it will – an acquittal on that ground would preclude the government from exercising its statutory right to appellate review. For that reason, there is "no other adequate means" by which the government may obtain relief from the magistrate court's error, other than mandamus. In re Sealed Case, 151 F.3d at 1063.

Moreover, by failing to rule on the government's motion in limine, and allowing the defendant to elicit evidence that he claims supports a "defense" of selective or vindictive prosecution, the magistrate court has severely hampered the government's ability to rebut these claims. As we discussed above, claims of selective or vindictive prosecution should be brought by pretrial motion. In this way, the filing of a motion gives the government notice of the claim, and allows for full development of the claim if the defendant can make the requisite showing. In the case of a selective-prosecution claim, the defendant must show clear evidence that the prosecutorial policy "had a discriminatory effect and was motivated by a discriminatory purpose." Armstrong, 517 U.S. at 465 (quotation and citation omitted). To establish a discriminatory effect, the defendant must show that similarly situated individuals were not prosecuted based on "an unjustifiable standard such as race, religion, or other arbitrary classification." Oyler v. Boles, 368 U.S. 448, 456 (1962).[11]

[11] The defendant's selective-prosecution claim, as alluded to in his August 24, 2010, telephone conversation with government counsel, the pretrial status conference on August 25, 2010, and the Motion to Compel, is not based on race, but on a claim "that other protestors on the White House sidewalk, similarly situated, have been disparately treated" (App. H at ¶ 4). The defendant has not, however, proffered any evidence that other protestors who have handcuffed themselves to

The defendant's failure to file a motion or make this showing has made it difficult for the United States to ascertain what witnesses or other evidence (including, potentially, prosecution data) it may need to gather and present to rebut the defendant's vague claims. In the case of vindictive prosecution, the government is similarly disadvantaged, particularly because the "prima facie" case described by the magistrate court does not appear to fall within the scope of the vindictive-prosecution doctrine. See Maddox, 238 F.3d at 446 ("In the prosecutorial context, the doctrine precludes action by a prosecutor that is designed to penalize a defendant for invoking any legally protected right available to a defendant during a criminal prosecution."). A proper pretrial motion would have avoided putting the government in the position of defending against a moving target, created by the defense and the magistrate court positing new theories as the case proceeded.

The magistrate court's announcement that it will consider selective or vindictive prosecution as a defense to the charge in this case is clear error that could irreparably harm the United States if the magistrate court were to acquit the defendant on either basis, thereby depriving the United States of its right to appeal. Such a finding also could cause irreparable damage to the reputation of the United States Attorney's Office, as it would directly attack the very integrity of the institution. Where there is no merit to either the selective- or vindictive-prosecution theories, the risk of such irreparable harm is clearly unwarranted.

C. No exceptional circumstances exist that would warrant relief from Rule 12(b)(3)(A)'s requirements

Under Rule 12(e), a party waives any Rule 12(b)(3) motion if not made before trial, unless, for good cause shown, the court grants relief from the waiver. See Gary, 74 F.3d at 313 (absent

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the White House fence have been disparately treated.

"exceptional circumstances," claim of selective prosecution not raised pretrial is waived); (Ronald) Jarrett, 822 F.2d at 1441 (mid-trial motion based on selective and vindictive prosecution waived where defendant failed to establish sufficient cause for court to excuse delay). Although defendant Choi still has filed no motion to dismiss, the magistrate court raised the claim of vindictive prosecution sua sponte. Because there is no good cause to excuse the failure of the defense to raise this claim pretrial, the magistrate court should not be permitted to consider it mid-trial, or post-trial, either based on a belated motion to dismiss that Choi may file, or sua sponte.

The USMJ indicated that it was "compelled to rule on the issues of law that emerge" (8/31/11 p.m. Tr. 5), and that he "only began to understand the nature of the claim being made [w]hen [he] heard the defendant's testimony" (id. at 7). The magistrate court's mid-trial recognition of the nature of the defendant's claim is not an exceptional circumstance that provides good cause for the defendant's failure to file a pretrial motion based on vindictive prosecution. As the USMJ described the claim – which has never been articulated by the defense – "The defendant's position is: I said something in March, I said something in April and I said something in November. The reason I was treated in November differently from the March and April is, by November, I began to offend the United States by what I was saying to the point that they treated me differently; and therefore, my rights under the First Amendment and Fifth Amendment were violated." (8/31/11 p.m. Tr. 14.) Not only does this fail to articulate a claim that the prosecution of Choi was designed to "penalize a defendant for invoking any legally protected right available to a defendant during a criminal prosecution," Maddox, 238 F.3d at 446, and notwithstanding that it is well within the bounds of prosecutorial discretion to prosecute someone after that person has been arrested three times for the same conduct in a nine-month period, the magistrate court's belated recognition of something known

to the defendant all along does not provide an exceptional circumstance that would excuse the Rule 12(e) waiver and warrant consideration of a motion to dismiss for vindictive prosecution either mid-trial or post-trial. There is no dispute that defendant Choi realized on November 30, 2010, when the criminal complaint was filed, that he was being prosecuted for failure to obey a lawful order. He knew at that time that he had not been prosecuted for the same conduct in March and April 2010, when he had been arrested after chaining himself to the White House fence. Everything he needed to know to make the claim now being advanced by the magistrate court was known to defendant Choi well before trial.

Similarly, to the extent that the defendant may intend to move to dismiss the complaint on selective-prosecution grounds, or the magistrate judge may intend to consider such a motion sua sponte, no exceptional circumstances exist to relieve the defendant from failing to file a selective-prosecution motion pretrial. At least as early as August 24, 2010, when defense counsel discussed the potential claim with government counsel, and August 25, 2010, when he brought it up during the pretrial status conference, the defendant knew of the basis for the assertion he later made during trial "that other protestors on the White House sidewalk, similarly situated, have been disparately treated" (App. H at ¶ 4). No cause exists to excuse the defendant from filing a motion to dismiss based on selective prosecution pretrial under Rule 12(b)(3)(A).[12]

[12] Application of the waiver rule is particularly warranted in this case, where previous defense counsel asserted that Choi "deliberately did not file any pretrial motions in this matter" (App. D). The defendant should not be afforded a second chance to advance a claim he appears deliberately to have chosen not to make pretrial.

CONCLUSION

Wherefore, the United States respectfully requests that the district court issue a writ of mandamus to the magistrate court, ordering the magistrate court to:

(1) refrain from considering selective or vindictive prosecution as a defense to the charge of failure to obey a lawful order;

(2) preclude further evidence at trial in support of a claim of selective or vindictive prosecution;

(3) deny as waived any motion to dismiss based on selective or vindictive prosecution that the defense may file mid-trial or post-trial; and

(4) refrain from sua sponte considering dismissal based on selective or vindictive prosecution either mid-trial or post-trial.

Respectfully submitted,

RONALD C. MACHEN JR.
United States Attorney

ROY W. McLEESE III,
GILBERTO GUERRERO,
Assistant United States Attorneys

/s/
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing appendix to be served by electronic means, on this 12th day of September, 2011, through the Court's CM/ECF system, upon Norm Kent, Esquire, Kent and Cormican, PA, 110 SE 6th Street, Suite 1970, Ft. Lauderdale, 33301.

/s/
ANGELA S. GEORGE
Assistant United States Attorney

APPENDIX FOR PETITIONER

UNITED STATES DISTRICT FOR THE DISTRICT OF COLUMBIA

MAG. NO. 10-739-11

UNITED STATES OF AMERICA, **Petitioner,**

v.

DANIEL CHOI,

Respondent.

PETITION FOR WRIT OF MANDAMUS
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RONALD C. MACHEN JR.,
United States Attorney.

ROY W. McLEESE III,
GILBERTO GUERRERO,
ANGELA S. GEORGE, DC BAR #470567,
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APPENDIX FOR PETITIONER

INDEX

Respectfully submitted,

RONALD C. MACHEN, JR.,
United States Attorney.

ROY W. McLEESE III,
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Assistant United States Attorneys.

/s/
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/s/
ANGELA S. GEORGE
Assistant United States Attorney

TAB A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	**Magistrate No. 10-739-11**
	:	
v.	:	
	:	**Trial Date: 8/29/11**
DANIEL CHOI,	:	
Defendant	:	**U.S. Magistrate Judge John M. Facciola**
	:	

GOVERNMENT'S OMNIBUS MOTION IN LIMINE TO LIMIT THE SCOPE OF EVIDENCE AND TESTIMONY REGARDING THE SUBJECT MATTER OF THE PROTEST, PRECLUDE DEFENDANT FROM MAKING A SELECTIVE PROSECUTION CLAIM, AND PRECLUDE THE DEFENSE OF IMPOSSIBILITY

The United States, by and through its attorney, the United States Attorney for the District of Columbia, hereby respectfully moves in limine to (I) limit the scope of evidence and testimony regarding the subject matter of the protest (ii) preclude defendant from raising a selective prosecution claim at trial, and (iii) preclude the defendant from relying on the defense of impossibility. As grounds for this motion, the United States relies on the following points and authorities and such other points and authorities as may be cited at a hearing on this motion.

I. BACKGROUND

On November 15, 2010, the defendant and 12 other individuals were each charged with one count of Failure to Obey a Lawful Order, in violation of Title 36, Code of Federal Regulations (C.F.R.). These charges stemmed from the following incident. At approximately 12:45 p.m., on November 15, 2010, in the area of Lafayette Park and the 1600 block of Pennsylvania Avenue, N.W., Washington, D.C., defendant and 12 other individuals ("the group"), who were dressed in civilian clothes and Army, Navy, and Air Force military uniforms, formed a group on the north side of Lafayette Park. Lafayette Park is located between the 1600

block of H Street, N.W. and Pennsylvania, Avenue, N.W., north of the White House. They walked in pairs side by side through Lafayette Park, crossed Pennsylvania Avenue, and continued to walk onto the White House sidewalk. The group then stepped up onto the masonry base at the bottom of the White House fence and affixed themselves with metal handcuffs to the White House fence, forming a single line across the center of the White House fence. After they all affixed themselves to the White House fence, U.S. Park Police ("U.S.P.P.") officers closed the White House sidewalk with police line tape, securing the center portion of the White House sidewalk.[1]

Then, using a loudspeaker, Lt. LaChance, of the U.S.P.P., gave verbal warnings. He informed the group that they were in violation of regulations applicable to the White House sidewalk and were ordered to leave. Lt. LaChance stated that if they failed to obey the lawful order, the members of the group would be arrested. To ensure that all of the members of the group were in a position to hear the warnings, a U.S.P.P. officer was assigned to the east and west ends of the line the defendants formed. Lt. LaChance, with a loudspeaker, stated the warnings three times successively in three minute intervals. Each officer posted at either end of the group indicated that he could hear the warnings. None of the members of the group who were affixed to the fence attempted to comply with Lt. LaChance's order. U.S.P.P. officers allowed an additional time to elapse to determine if any of the group were going to comply with

[1] The U.S.P.P. officers have the legal authority to maintain law and order and protect persons and property within areas of the National Park System. The White House and its grounds have been part of the National Park System in Washington, D.C., since 1933. The White House sidewalk and any appurtenances, including the White House fence and the masonry base at the bottom of the fence, connected to it constitute the White House grounds.

the order. The group remained affixed to the fence.

During the demonstration, the members of the group chanted. There was one individual from the group who was not affixed to the fence. He had a bull horn and was speaking simultaneously with the others who were demonstrating. They engaged in this conduct to protest the United States military's "Don't Ask, Don't Tell" policy regarding a military service person's sexual orientation. The group chanted phrases such as "I am somebody," "I was court marshaled," "I represent all of those who were court marshaled for being who they are," "Where's the change, Mr. Obama, stand up." Additionally, when prompted by the individual with the bull horn, each member of the group stated his/her name and rank.

After it became apparent that the members of the group had no intention of complying with Lt. LaChance's order, U.S.P.P. officers, equipped with bolt cutters, began to separate each person from the White House fence by cutting each set of handcuffs. As this was done, each member of the group refused to comply with the arrest procedure. They refused to walk from the masonry base to the processing area. As a result, the officers assisted some of the members of the group by preventing them from hitting the ground and injuring themselves. Other officers had to carry some of the members of the group from the masonry base to the processing area. They were arrested for Failure to Obey a Lawful Order. Each member of the group was taken into custody and transported to the U.S.P.P. District 5 Substation where they were positively identified by each respective arresting officer. The members of the group were detained until it was determined that they would be released to return to court for an initial appearance on a later date.

Twelve of the 13 members of the group plead guilty to Failing to Obey a Lawful Order in violation of 36 C.F.R. Section 2.32(a)(2) under the terms of a Deferred Sentencing Agreement. The defendant, Daniel Choi, is the only member of the group proceeding to trial which is scheduled to begin on August, 29, 2011.

On Wednesday, August 24, 2011, at 9:30 p.m., defense counsel Robert Feldman contacted undersigned counsel, Assistant United States Attorney Angela George, and initially, wanted to discuss whether the government would stipulate to the authenticity of photographs that depicted individuals on the White House sidewalk ("WHS") in front of the White House fence, celebrating and supporting President Barack Obama for the death of Osama Bin Laden. When undersigned counsel stated that she would not stipulate to the authenticity of the photos and claimed that they were not relevant to the charged offense, Mr. Feldman, in summary, stated that they were connected to the defendant's claim that he is being selectively prosecuted. There was additional conversation about these subjects and others, and then, the call ended. Additionally, on Thursday, August 25, 2011, this Court held a hearing, at Mr. Feldman's request, to address, according to Mr. Feldman, subjects and/or issues the parties could not agree on. After the case was called and pursuant to the Court's inquiry as to the necessity of the status hearing, defense counsel began to discuss the government's position regarding the authenticity of the photographs and the defendant's request of the prosecutor to make certain law enforcement witnesses available. Defense counsel never affirmatively addressed the issue of selective prosecution. He did not mention selective prosecution until the Court summarized the issue. Prior to that, the government told the Court defense counsel mentioned it in the telephone conversation on August 25th, and the government objected and stated that the issue, according to Fed. R. Crim. P. 12(b),

should be raised and resolved prior to trial. Further, the government also objected to the authenticity of the photographs that were attached to a document that defense counsel delivered directly to chambers. Then, the Court ruled that: (1) the selective prosecution claim would be resolved at the end of the case; (2) it would take judicial notice that the White House is depicted in certain photographs; and (3) any witnesses the defense wanted to secure for trial should be subpoenaed.

Even though no pleading has been filed, it appears that defendant is now claiming that he is being selectively prosecuted in violation of his Constitutional rights.[2] Not only is defendant procedurally barred from raising a selective prosecution claim during trial, even if he had raised the claim in a timely manner, he cannot make a prima facie showing of selective prosecution. Therefore, he should be precluded from raising the claim, and attempting to introduce any evidence related to it during the trial.

II. Arguments

A. Motion in Limine to Limit the Scope of Evidence Regarding the Subject Matter of the Protest.

1. Subject Matter of the Protest May Have Limited Relevance

The fact that the defendant was protesting the United States military's "Don't Ask, Don't Tell" policy regarding a military service person's sexual orientation is only relevant to the extent the Courts needs to determine the lawfulness of the order given by the U.S. Park Police in

[2] Defendant has provided to the Court, via hand-delivery on August 25, 2011, Court's chambers and without filing, a document entitled "Photographic and Videographic Exhibits from Defendant Pertaining to the Celebration in Front of the White House of the Death of Bin Laden." As of August 28, 2011, no motion, or corresponding points and authorities associated with this document has been filed.

deciding whether the defendant violated 36 C.F.R. Section 2.32(a)(2) (Failure to Obey a Lawful Order). Under Fed. R. Evid. 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401.

To prove Failure to Obey a Lawful Order, the government must prove that the defendant violated the lawful order of a government employee or agent who is authorized to maintain order and control public access and movement during a law enforcement action, or other activities where the control of public movement and activities is necessary to maintain order and public safety. See 36 C.F.R. Section 2.32(a)(2). In determining whether the government's evidence proves the order was lawful, the Court may decide to consider the subject matter of the protest during the offense. The government acknowledges, that the Court may conclude that it is necessary to consider the purpose of the demonstration to determine the lawfulness of the order given by U.S. Park Police on November 15, 2010. In that respect, the purpose of the demonstration would be relevant to whether the defendant failed to obey a lawful order. However, any discussion of the military's "Don't Ask, Don't Tell" policy outside the context of the offense conduct on November 15, 2010 is irrelevant. Thus, the defendant should be precluded from eliciting testimony or introducing evidence in any other form that references, for example, the history of the "Don't Ask, Don't Tell" policy in the U.S. Military or the mistreatment of gay, lesbian, or transgender military service members. Therefore, pursuant to Rule 401 of the Federal Rules of Evidence, defense counsel should not be allowed to elicit testimony or introduce any other evidence regarding "Don't Ask, Don't Tell" in any other context besides the purpose of the defendant's demonstration conduct on November 15, 2010.

B. Motion in Limine to Preclude Evidence of Selective Prosecution

1. Defense Waived Any Selective Prosecution Claim By Failing to Raise it Pre-Trial

Generally, as an initial matter, "[a] selective prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution." U.S. v. Armstrong, 517 U.S. 456, 465 (1996). The D.C. Circuit, in U.S. v. Washington, held that "...the issue of selective prosecution is one to be determined by the court, as it relates to an issue of law entirely independent of the ultimate issue of whether the defendant actually committed the crimes..." U.S. v. Washington, 705 F.2d 489 (D.C. Cir. 1983). Given this issue is a matter of law, it should be decided prior to trial and not considered along with evidence that relates to the merits of the case. The government's argument is based upon well-settled federal law which states the issue of selective prosecution should be resolved prior to trial. See Fed. R. Crim. P 12(b)(3)(A). Further, the process by which a Court considers evidence in support of the claim and makes a final determination on the issue supports the government's contention that the issue should be resolved prior to trial. If the defendant meets the threshold evidentiary requirement to obtain discovery to support the claim, the government must turn over discovery, and then the Court must consider, based upon the evidence in the discovery, whether the prosecution exercised its discretion with a discriminatory purpose, creating a discriminatory effect. If the defendant fails to establish these two elements, the Court should deny the defendant's motion to dismiss.[3] Most

[3]Even if the Court concludes that the discussion of this issue at the status hearing on August 26, 2011 properly puts the issue before the Court, the defendant still has not stated the remedy he is seeking. If he is not seeking a dismissal of the case pursuant to Fed. R. Crim. P. 12, then the Osama Bin Laden photographs should not be introduced as evidence in the trial.

significantly, the defendant will not be allowed to inquire regarding this issue during the trial. Finally, if the Court decides to dismiss the case, the government has a right to appeal that decision prior to trial, Fed. R. Crim. P. 58, and before jeopardy attaches. (i.e., the calling of the first witness in a bench trial).

The defendant has waived any selective prosecution claim because he did not timely raise the issue before the Court. A selective prosecution claim is a legal claim that alleges "a defect in instituting the prosecution" and as such, must be raised prior to trial in accordance with Rule 12 of the Federal Rules of Criminal Procedure or else it is waived. Fed. R. Crim. P. 12(b)(1) and (3); U.S. v. Washington, 705 F.2d 489, 495 (D.C. Cir. 1983)(citing with authority U.S. v. Taylor, 562 F.2d 1345, 1356 (2nd Cir. 1977) (selective prosecution claim waived if not raised prior to trial)). Other than submitting a document, a mere four days before the trial, that contained "Photographic Exhibits Pertaining to the Celebration In Front of the White House f the Death of Bin Laden," defendant has failed to raise a selective prosecution claim. Even considering the discussion during the telephone conference on August 25, 2011, which is the first time defendant hinted at a selective prosecution claim, defendant has failed to articulate a selective prosecution claim and certainly has not complied with the requirements set forth in Rules 12 and 47 of the Federal Rules of Criminal Procedure. Given defendant's failure to raise the claim prior to trial, failure to articulate grounds for such a claim in a way that allows the government to properly respond, and failure to explain the reason for not timely raising the claim, this Court should preclude defendant from raising a selective prosecution claim during trial. See Gary v. United States, 74 F.3d 304, 313 (1st Cir. 1996) (defendant's selective prosecution claim waived because

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irrelevant.

he did not raise it until the morning of trial).

2. Defendant Cannot Make a Prima Facie Case for Selective Prosecution

Even if the Court permits defendant to raise a claim of selective prosecution during trial, defendant cannot make a prima facie case that entitles him to discovery from the government on the issue, let alone prevail on the merits. "In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978). That discretion is not without limit, of course. The government may not base its charging decision on "'an unjustifiable standard such as race, religion, or other arbitrary classification.'" Id. (quoting Oyler v. Boles, 368 U.S. 448, 456 (1962)).

To establish a selective prosecution claim, defendant must show: "that (1) [he] was singled out for prosecution from among others similarly situated and (2) that [his] prosecution was improperly motivated, i.e., based on race, religion or another arbitrary classification." U.S. v. Washington, 705 F.2d 489, 494 (D.C. Cir. 1983) (rejecting selective prosecution claim that defendant was prosecuted because of her religion); U.S. v. Palfrey, 499 F. Supp. 2d 34, 39 (D.D.C. 2007) (rejecting selective prosecution claim); U.S. v. Dixon, 486 F. Supp. 2d 40, 44-45 (D.D.C. 2007) (rejecting selective prosecution claim). The Supreme Court has long held that the standard to make a selective prosecution claim "is a demanding one." U.S. v. Armstrong, 517 U.S. 456, 465 (1996). Even to obtain discovery on a selective prosecution claim, a defendant must make a showing of "some evidence tending to show the existence of the essential elements of the defense, discriminatory effect and discriminatory intent." Id. at 468 (rejecting a selective

prosecution argument that the government singled out black defendants for crack-related prosecutions and denying a defense request to conduct discovery on that issue) (internal quotation marks and citation omitted). In other words, defendant must show both that the decision to prosecute him was motivated by an improper purpose, and that such prosecution had a discriminatory effect on him. See Palfrey, 499 F. Supp. 2d at 34 (rejecting defendant's claim of selective prosecution for lack of any evidentiary support).

Defendant has proffered no evidence at all regarding discriminatory intent. Nor has he made any showing of discriminatory effect: "some evidence that similarly situated defendants of other [subject matter protests and sexual orientations] could have been prosecuted, but were not." Armstrong, 517 U.S. at 469. Defendant has not even alleged – much less provided "some evidence" – that others similarly situated to him were not prosecuted for misdemeanor Failure to Obey a Lawful Order 36 C.F.R. Section 2.32(a)(2). The only thing that defendant has submitted to the Court is his document of "Photographic Exhibits Pertaining to the Celebration In Front of the White House of the Death of Bin Laden." Defendant maintains that these photographs depict people at the White House fence celebrating the killing of Osama Bin Laden, and demonstrating that they support President Obama. Defendant claims that they were not arrested by the U.S.P.P. because they supported President Obama's Administration. In contrast, defendant claims that he was arrested because he protested against the military's "Don't Ask, Don't Tell" policy, and because of his sexual orientation, which he characterizes as an anti-Obama perspective. Beyond such veiled and baseless assertions, defendant has not presented any evidence, and cannot present any evidence, to support his claims.

Defendant and the other 12 members of the group were ordered three separate times to

leave the WHS, and they refused to do so. The order was reasonable, not speech-content based, and not arbitrary and capricious. Under U.S. v. Goldin, 311 F.3d 191 (3d Cir. 2002) and U.S. v. Poocha, 259 F.3d 1077 (9th Cir. 2001), park police and/or park rangers have authority to issue reasonable orders that are not based on content of speech, and are not arbitrary and capricious, "where control of public movement and activities is necessary to maintain order and public safety." 36 C.F.R. 2.32(a)(2). In Goldin, the protesters were not violating a regulation when they were ordered to disperse, and the Third Circuit upheld the order as lawful because it was reasonable under the circumstances and was not based on the content of the protesters' speech. See Goldin, 311 F.3d 191. In Poocha, the Ninth Circuit upheld a conviction for failing to follow a lawful order based on a park ranger's ordering bystanders to an arrest to leave the area because the bystanders were cursing the officers but not violating any federal regulation. See Poocha, 259 F.3d 1077.

Further, if the Court determines that the government must establish that the defendant's conduct was unlawful as a predicate to concluding the order was lawful, the government can prove the defendant's conduct was unlawful. In addition to the facts proffered in this motion, the government will present evidence that will establish the defendant engaged in unlawful conduct pursuant to 36 C.F.R. Section 7.96 (Demonstrating without a Permit) and/or 36 C.F.R. 2.34 (Disorderly Conduct).

In this case, the U.S.P.P. had the authority to order him and the other members of the group to un-handcuff themselves and to leave the area when they chained themselves to the WHF, blocking the view of the public and security officers into the White House grounds, and perhaps concealing hazardous materials or explosives. Defendant cannot show that his arrest and

subsequent prosecution was motivated by any discriminatory purpose or that it had any discriminatory effect. Therefore, the Court should preclude the defendant from raising a selective prosecution claim at trial.

C. Motion in Limine to Preclude Defense of Impossibility

The defendant intends to present the defense of impossibility. As the government understands this defense, the defendant claims that because he was handcuffed to the WHF and was without benefit of a key that would have unlocked his handcuffs, it was therefore impossible for him to comply with the repeated orders given by U.S.P.P. officers to disperse.[4] The defendant's claim is without merit, and this Court should preclude the defense from being advanced at trial.

In the arena of contempt litigation, while well-settled that impossibility of performance is a valid defense to a motion for contempt, see United States v. Rylander, 460 U.S. 752, 757 (1983), and that a defendant cannot be held in contempt for failure to obey a sanctions order if he lacks financial ability to comply with that order, see Tinsley v. Mitchell, 804 F.2d 1254, 1256 (D.C. Cir.1986) (per curiam); O'Leary v. Moyer's Landfill, Inc., 536 F.Supp. 218, 219 (E.D.Pa.1982), it is also equally well-settled that the burden of production and proof rests on a defendant advancing this defense, see Rylander, 460 U.S. at 757; O'Leary, 536 F.Supp. at 219. A defendant advancing the defense of impossibility "must show 'categorically and in detail' why he

[4]Once again, instead of filing a pre-trial motion as Fed. R. Crim. P. 12(b)(2) requires, the defendant raises this legal issue in a non-legal forum, the media. Norm Kent, defendant's co-counsel of record, according to an article in The Miami Herald, stated "One of the defenses I intend to invoke is impossibility." According to the electronic court docket, PACER, the defendant has yet to file a motion alleging this defense, and he has not provided any oral notification to the Court.

is unable to comply." O'Leary, 536 F.Supp. at 219 (quoting N.L.R.B. v. Trans-Ocean Export Packing, Inc., 473 F.2d 612, 616 (9th Cir.1973)). In addition, unless a defendant is completely unable to comply with the Court's Order's due to poverty, he must comply to the extent that his finances allow him. See S.E.C. v. Musella, 818 F.Supp. 600, 602 (S.D.N.Y.1993).

Moreover, "where the person charged with contempt is responsible for the inability to comply, impossibility is not a defense to the contempt proceedings." Pesaplastic, C.A. v. Cincinnati Milacron Co., 799 F.2d 1510, 1512 (11th Cir.1986). See also, In re Lawrence, 238 B.R. 498, 500 (S.D. Fla. 2000) (where a defendant self-creates the impossibility, the defense of impossibility is invalid).

In this case, the evidence will show that the defendant and his fellow protestors handcuffed themselves to the WHF. While handcuffed to the fence, the protestors were told on three occasions to disperse or face arrest. These instructions were given using loudspeaker over a duration of approximately 9 minutes. During that time, the defendant never (I) asked to be released, (ii) informed the police that he did not have a key to his handcuff, (iii) indicated that he would disperse upon being un-handcuffed, nor (iv) stated or made any gesture indicating the same. Rather, the defendant continued to chant his protest and, as depicted on at least one publicly aired video, led his fellow chanting protestors. On these facts, the Court should preclude the defendant from raising the defense of impossibility. First, the defendant cannot meet his burden. His arrest was intentional, not a mistake, nor did the defendant intend at any moment to avoid arrest. Second, the evidence will further show that the defendant created his circumstance, i.e. handcuffing himself to the fence, and therefore, he cannot benefit from his self-created circumstance.

WHEREFORE, the government respectfully requests that this Court grant its motions to (I) limit the scope of evidence and testimony regarding the subject matter of the defendant's protest, (ii) preclude the defendant from raising a selective prosecution claim, and (iii) preclude the defense of impossibility.

Respectfully submitted,

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D.C. Bar No. 447889

By: /s/
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TAB B

10-739-M-01

AO 91 (Rev. 5/85) Criminal Complaint

FILED

NOV 30 2010

Clerk, U.S. District & Bankruptcy Courts for the District of Columbia

United States District Court
For The District of Columbia

UNITED STATES OF AMERICA

V.

CRIMINAL COMPLAINT

RAPHAEL FARROW
DOB: 12/4/57
EVELYN THOMAS
DOB: 6/30/68
JUSTIN ELZIE
DOB: 7/762
ROBERT SMITH
DOB: 6/25/82
DANIEL FOTOU
DOB: 1/13/76

AUTUMN SANDEEN
DOB: 6/16/59
MIRIAM BEN-SHALOM
DOB: 5/3/48
MARA BOYD
DOB: 9/27/81
DANIEL CHOI
DOB: 2/22/81

MICHAEL BEDWELL
DOB: 6/23/47
SCOTT WOOLEDGE
DOB: 3/28/67
ROBIN MCGEHEE
DOB: 10/4/73
IAN FINKENBINDER
DOB: 5/5/82

CASE NUMBER:

(Name and Address of Defendant)

I, the undersigned complainant being duly sworn state the following is true and correct to the best of my knowledge and belief. On or about November 15, 2010, in the District of COLUMBIA defendants did,

(Track Statutory Language of Offense)

violated the lawful order of a government employee or agent authorized to maintain order and control public access and movement during a law enforcement action or other activities where the control of public movement and activities is necessary to maintain order and public safety.

in violation of Title 36 United States Code of Federal Regulation, 2.1(a)(5).

I further state that I am OFFICER MICHAEL FERMAINT, and that this complaint is based on the following facts:

SEE ATTACHED STATEMENT OF FACTS

Continued on the attached sheet and made a part hereof: ☒ Yes ☐ No

Signature of Complainant
OFFICER MICHAEL FERMAINT
UNITED STATES PARK POLICE

Sworn to before me and subscribed in my presence,

NOV 30 2010
Date

at Washington, D.C.
City and State

ALAN KAY
U.S. MAGISTRATE JUDGE
Name & Title of Judicial Officer

Signature of Judicial Officer

10-739-M-01

STATEMENT OF FACTS

On November 15, 2010, at approximately 2:30 p.m., members of the United States Park Police observed demonstrators in the Lafayette Square and on the White House sidewalk in the area of 1600 Pennsylvania Avenue, N.W., Washington, D.C. The demonstrators, later identified as Rapahel Farrow, Autumn Sandeen , Michael Bedwell, Evelyn Thomas, Miriam Ben-Shalom, Scott Wooledge, Justin Elzie, Mara Boyd, Robin McGehee, Robert Smith, Daniel Choi, Ian Finkenbinder, and Daniel Fotou walked through the Lafayette Square, across Pennsylvania Avenue, N.W., and stepped onto the White House sidewalk. All demonstrators handcuffed themselves to the fence that surrounds the perimeter of the White House and stood still on the masonry base of the fence that connects to the White House sidewalk. The demonstrators chanted in protest of the U.S. Military's "Don't Ask, Don't Tell" policy. Officers gave three verbal warnings to the defendants that they were in violation of federal regulations and needed to leave the area. Defendants failed to obey the orders of the officers and were removed from the fence by officers using bolt cutters. The defendants were placed under arrest.

658

OFFICER MICHAEL FERMAINT
UNITED STATES PARK POLICE

NOV 30 2010

SWORN AND SUBSCRIBED BEFORE ME ON THIS _____ DAY OF NOVEMBER, 2010.

U.S. MAGISTRATE JUDGE

ALAN KAY
U.S. MAGISTRATE JUDGE

TAB C

AO 91 (Rev. 5/85) Criminal Complaint

United States District Court
For The District of Columbia

UNITED STATES OF AMERICA

V.

AMENDED CRIMINAL COMPLAINT

RAPHAEL FARROW
DOB: xx/x/xx
EVELYN THOMAS
DOB: x/xx/xx
JUSTIN ELZIE
DOB: x/x/xx
ROBERT SMITH
DOB: x/xx/xx
DANIEL FOTOU
DOB: x/xx/xx

AUTUMN SANDEEN
DOB: x/xx/xx
MIRIAM BEN-SHALOM
DOB: x/x/xx
MARA BOYD
DOB: x/xx/xx
DANIEL CHOI
DOB: x/xx/xx

MICHAEL BEDWELL
DOB: x/xx/xx
SCOTT WOOLEDGE
DOB: x/xx/xx
ROBIN MCGEHEE
DOB: xx/x/xx
IAN FINKENBINDER
DOB: x/x/xx

CASE NUMBER:

(Name and Address of Defendant)

I, the undersigned complainant being duly sworn state the following is true and correct to the best of my knowledge and belief. On or about November 15, 2010, in the District of COLUMBIA defendants did,

(Track Statutory Language of Offense)

violated the lawful order of a government employee or agent authorized to maintain order and control public access and movement during a law enforcement action or other activities where the control of public movement and activities is necessary to maintain order and public safety.

in violation of Title 36 United States Code of Federal Regulation, 2.32(a)(2).

I further state that I am OFFICER MICHAEL FERMAINT, and that this complaint is based on the following facts:

SEE ATTACHED STATEMENT OF FACTS

Continued on the attached sheet and made a part hereof: ☒ Yes ☐ No

Signature of Complainant
OFFICER MICHAEL FERMAINT
UNITED STATES PARK POLICE

Sworn to before me and subscribed in my presence,

Date

at Washington, D.C.
City and State

Name & Title of Judicial Officer

Signature of Judicial Officer

STATEMENT OF FACTS

On November 15, 2010, at approximately 2:30 p.m., members of the United States Park Police observed demonstrators in the Lafayette Square and on the White House sidewalk in the area of 1600 Pennsylvania Avenue, N.W., Washington, D.C. The demonstrators, later identified as Raphael Farrow, Autumn Sandeen , Michael Bedwell, Evelyn Thomas, Miriam Ben-Shalom, Scott Wooledge, Justin Elzie, Mara Boyd, Robin McGehee, Robert Smith, Daniel Choi, Ian Finkenbinder, and Daniel Fotou walked through the Lafayette Square, across Pennsylvania Avenue, N.W., and stepped onto the White House sidewalk. All demonstrators handcuffed themselves to the fence that surrounds the perimeter of the White House and stood still on the masonry base of the fence that connects to the White House sidewalk. The demonstrators chanted in protest of the U.S. Military's "Don't Ask, Don't Tell" policy. Officers gave three verbal warnings to the defendants that they were in violation of federal regulations and needed to leave the area. Defendants failed to obey the orders of the officers and were removed from the fence by officers using bolt cutters. The defendants were placed under arrest.

_____
OFFICER MICHAEL FERMAINT
UNITED STATES PARK POLICE

SWORN AND SUBSCRIBED BEFORE ME ON THIS _____ DAY OF NOVEMBER, 2010.

_____
U.S. MAGISTRATE JUDGE

TAB D

George, Angela (USADC)

From: CHRISRLYNN@aol.com
Sent: Wednesday, July 06, 2011 11:08 AM
To: George, Angela (USADC)
Cc: kurland@kurlandassociates.com
Subject: Re: US v. Daniel Choi, Mag. No. 10-739-01

Dear Angela:
I have received your email and wish to explain that the accused deliberately did not file any pre-trial motions in this matter. Thanks and Happy 4 th to you as well. I am wondering where May went.
Sincerely
Chris Lynn

In a message dated 7/6/2011 10:02:01 A.M. Eastern Daylight Time, Angela.George@usdoj.gov writes:

Chris,

First, I apologize for not sending the discovery on Friday, July 1st as I stated. I have prepared some discovery and can place it in the mail via Federal Express today. As I reviewed PACER and went through the file, I noticed that you have not submitted a written request for discovery under Rule 16. As I re-read Rule 16, it requires that the defendant request Rule 16 to trigger production. Please submit a written request today so I can submit the package to Federal Express.

A quick response to this email requesting discovery pursuant to Rule 16 should suffice. Thanks, and I hope you had a wonderful Fourth of July holiday.

From: George, Angela (USADC)
Sent: Monday, June 27, 2011 12:27 PM
To: 'chrisrlynn@aol.com'
Cc: 'kurland@kurlandassociates.com'
Subject: US v. Daniel Choi, Mag. No. 10-739-01

Chris,

As requested today on the phone, I will send all correspondence to you. I plan to send discovery to you on Friday. Let me know if you have any further questions or concerns. I can be reached at 202-509-5379; However, it is best to send an email as I am out of the office in court most days.

My address is:

AUSA Angela S. George
U.S. Attorney's Office for the District of Columbia
Judiciary Center
555 4th Street, N.W.
Room 4444
Washington, D.C. 20530

Email: Angela.George@usdoj.gov

Thanks.

TAB E

George, Angela (USADC)

From: George, Angela (USADC)
Sent: Friday, August 12, 2011 5:09 PM
To: 'chrisrlynn@aol.com'
Cc: 'kurland@kurlandassociates.com'
Subject: US v. Daniel Choi, Mag.No. 10-739 - Trial Materials

Chris,

Please read the following attachments. As it states in the letter, a video of the events will be provided under separate cover via Federal Express. If you have any questions, please call. Have a great weekend.


choidiscoltr.pdf


choidocuments.pdf.pdf


White House Area.pdf

TAB F

George, Angela (USADC)

From: CHRISRLYNN@aol.com
Sent: Tuesday, August 16, 2011 5:26 PM
To: George, Angela (USADC)
Subject: Re: US v. Daniel Choi, Mag.No. 10-739 - Trial Materials

received DVD today thanks

In a message dated 8/12/2011 5:08:52 P.M. Eastern Daylight Time, Angela.George@usdoj.gov writes:

> Chris,
>
> Please read the following attachments. As it states in the letter, a video of the events will be provided under separate cover via Federal Express. If you have any questions, please call. Have a great weekend.

TAB G

George, Angela (USADC)

From: CHRISRLYNN@aol.com
Sent: Monday, August 22, 2011 2:57 PM
To: George, Angela (USADC)
Subject: Re: US v. Daniel Choi, Mag.No. 10-739 - Trial Materials

Dear Angela:
Two new attorneys will appear for this trial on Monday. One is a friend for 25 years Robert Feldman a veteran criminal defense attorney (and former Prosecutor) and Norm Kent from Florida. I will sponsor both prohac
Have you given any thoughts to the audibility factor, raised in my earlier call? .Also is your office willing to concede speedy trial? You must agree it is long gone. Let me know thanks
Chris Lynn

In a message dated 8/12/2011 5:08:52 P.M. Eastern Daylight Time, Angela.George@usdoj.gov writes:

> Chris,
>
> Please read the following attachments. As it states in the letter, a video of the events will be provided under separate cover via Federal Express. If you have any questions, please call. Have a great weekend.

TAB H

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA Docket No. 10-739M-11

vs.

DANIEL CHOI,

Defendant,

_____-/

MOTION TO COMPEL PRODUCTION

Comes now the Defendant, Daniel Choi, and files this motion to compel production of certain documents, pursuant to the Federal Rules of Criminal Procedure, 16 and 17, and as grounds therefore would show:

1. That trial in the above styled cause commenced on August 29, 2011;
2. That prior to trial the US filed a motion to strike selective prosecution as a prospective defense;
3. That the Defendant in this case has not only been articulating his first amendment rights to protest the unconstitutional policies of the US military's 'Don't Ask, Don't Tell' provisions, it has asserted that the government may have acted vindictively and with animus towards the above named Defendant;
4. That to prove a claim of selective prosecution the Defendant is prepared to show that other protestors on the White House sidewalk, similarly situated, have been disparately treated;
5. That this issue has been raised by the US in its direct examination of witnesses, such as US Park Police officer Robert La Chance.
6. More specifically, at page 49 of the official court transcript of the trial record, commencing at Line 19, Lt. La Chance is asked by the US, Ms. George, whether or not he received "any information from any other law enforcement agencies about the demonstrtations on November 15, 2010."
7. At Line 22, La Chance responds in the affirmative, then indicating that he "received an email from the US Secret Service." and that further, upon inquiry from the court at page 50, line 17, whether there were discussions by said agencies about what was going to happen that day.
8. At Line 21, the La Chance replies 'Yes,' indicating further in pages 50-52, even upon the Court's own questioning that a briefing occurred, the contents and import of which may be in fact memorialized in said e mails from the Secret Service.
9. The Defendant has sent a letter asking the US to produce this email and any others which may be probative of the defendant's theory of this case, to wit, that he may have been selectively targeted due to bad faith, ill will of government agents extending from the arresting officers of the US Park Police to the Secret Service to representatives of the President of the United States.
10. The US has not voluntarily agreed to provide this email prior to the return of La Chance to the stand on the morning of August 31, 2011.
11. The Defendant submits this and corresponding or related emails should be made available to it as the US opened the door for the same in its direct examination of its key witness.
12. Further, the US is so concerned about the Defendant raising this defense it had, on the eve of trial, filed its own Motion in Limine to bar a defense of Selective Prosecution, based on a

purported failure of the Defense to raise it pre trial.

13. Now, as a result of the government's acts in prosecuting this case, they have opened the door to raising this motion, and further the defendant, in support thereof, will show, based on the evidence adduced in the trial so far, that the government is duty bound to produce this material.
14. Further, this material is arguably Jenks material, requested by defense counsel Anne Wilcox, prior to the start of this trial, on May 2, 2011, asking for "all police documents, reports and notes" used in this investigation.
15. As a consequence of the failure to produce the same, the US attorney may have been non compliant in producing critical Brady material, arguably necessitating a hearing to determine whether the plaintiff's conduct was inad vertent or inexcusable, violating Brady vs. US.
16. Accordingly, today the Defendant issued subpoenas to the Department of Interior and the Secret Service, under the aegis of Homeland Security, and the undersigned hereby requests that this court enter an order compelling said parties to appear and submit "all documents, electronically stored information, and objects pertaining to Dan Choi, and any and all such notes leading up to and including his November 15, 2010 arrest in front of the White House, providing any material, memoranda, notes, emails, related to Daniel Choi being prosecuted therefrom, including the decision to do so in federal court, and any surveillance, and intelligence,or any briefing materials evolving out of the same criminal activity which is the subject of this prosecution.
17. Finally, as the Defendant has put forth the argument that his conduct in the above styled cause was first, a political necessity, and second, in order to further assert his argument that his goal of engaging in expressive, non violent, first amendment protest was being thwarted and tainted by the Plaintiff even before its inception.
18. Other grounds and caselaw to be argued ore tenus.

Norman Elliott Kent
Attorney at Law
110 SE 6th Street Suite 1970
Fort Lauderdale, FL 33301
954 763 1900
norm@normkent.com
Florida Bar 271969

I hereby certify that the foregoing motion has been electronically delivered to the US attorney trying this case, Angela George, this 30th day of August, 2011.

TAB I

Charles Guddemi/USPP/NPS
11/22/2010 12:15 PM

To angela.george@usdoj.gov, Timothy_Hodge@nps.gov, Robert_LaChance@nps.gov
cc Ryan.Lemasters@usss.dhs.gov
bcc
Subject Fw: POSSIBLE "Get Equal" demo on Monday with CD

AUSA George

Here is how the USPP were notified. USSS-UD Sgt. LeMasters notified us. His contact information is below in his e-mail.

Thanks

Charlie

Captain Charles J. Guddemi
United States Park Police
Commander, Special Forces
SWAT, K9, Motorcycle, Aviation and Special Event Units
1100 Ohio drive S.W.
Washington, D.C. 20024

Office (202) 610-7091
Fax (202) 426-0612

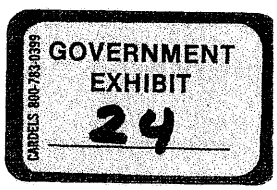
----- Forwarded by Charles Guddemi/USPP/NPS on 11/22/2010 12:12 PM -----

Stephanie Clark/USPP/NPS
11/12/2010 02:06 PM

To Dennis Bosak/USPP/NPS, Jerry_Marshall@nps.gov, Philip Beck/USPP/NPS@NPS, Robert_LaChance@nps.gov, Terry_Felt@nps.gov, "Heather Putnam" <Heather_Putnam@nps.gov>, "Wayne Johnson" <Wayne_R_Johnson@nps.gov>, "Mark Adamchik" <Mark_Adamchik@nps.gov>, "Timothy McMorrow" <Timothy_McMorrow@nps.gov>
cc "Charles Guddemi" <Charles_Guddemi@nps.gov>
Subject Fw: POSSIBLE "Get Equal" demo on Monday with CD

Fyi.
Sgt Stephanie Clark
Special Events Coordinator
Special Forces, US Park Police
202-905-1612

From: "RYAN LEMASTERS (UDW)" [Ryan.Lemasters@usss.dhs.gov]
Sent: 11/12/2010 12:48 PM EST
To: Christopher Silva; Stephanie Clark; "Pecher, Andrew W." <Andrew.Pecher@uscp.gov>; "Gallo, John D." <John.Gallo@uscp.gov>
Cc: "ROBERT MCSWIGGAN (UDW)" <Robert.Mcswiggan@usss.dhs.gov>



Subject: POSSIBLE "Get Equal" demo on Monday with CD

Good afternoon. Can you advise if any of you have any additional on the following info?
I just heard from a staff member over here that word on the street is that Get Equal is planning a protest Monday in front of the WH. Staff member also stated that he is hearing Choi will be in attendance and it is possible that 10-15 people will handcuff themselves to the fence.

Andy/John - The contact also stated that it is possible that they will conduct "sit-ins" in the Reid and Levin Senate Offices.

I don't have any further from the staffer, OS only reveals that the group is collecting cash for an upcoming "large action" (No specifics given). If I get any additional I will forward it along.

Good Times,
Ryan

Ryan Lemasters
Intelligence / Liaison Sergeant
United States Secret Service / Uniformed Division
White House Branch
(O) 202-757-1133
(C) 202-538-9417

E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	**CHIEF JUDGE ROYCE C. LAMBERTH**
v.	)	**(MAGISTRATE JUDGE JOHN M. FACCIOLA)**
DANIEL CHOI,	)	**No. 10-739-11**
Defendant.	)	

DEFENDANT LT. DAN CHOI'S
RESPONSE TO GOVERNMENT'S
"PETITION FOR WRIT OF MANDAMUS"

INTRODUCTION

To paraphrase Stephen Sondheim, a funny thing happened on the way to what the U.S. Government thought would be a conviction of Gay-civil-rights leader Lieutenant Dan Choi during its criminal trial of him begun on August 29, 2011. And the term "funny" here is used not as in "ha-ha," but as in "something is rotten in the State of America." What happened was that the U.S. Government literally got caught persecuting—by selective/vindictive prosecution—an innocent citizen simply because he had dared to criticize the President of the United States for discrimination against Gay people.

During Lt. Choi's criminal trial, evidence was exposed indicating that the Government had not only brought a heightened federal charge of disobeying an order against Lt. Choi that the Government knew was baseless to begin with, but had decided to bring such a baseless heightened charge before the allegedly-disobeyed order was even given—all in an effort to stop Lt. Choi from "offending" the White House with his powerfully eloquent, protected speech against discrimination in front of the White House. Furthermore, evidence was exposed during Lt. Choi's criminal trial indicating that the Government had apparently illegally spied on Lt.

Choi and other peaceful and lawful Gay-rights activists, leading up to and beyond when the Government decided to bring a baseless charge against Lt. Choi.

Even more damaging, evidence was exposed during Lt. Choi's criminal trial indicating that the paper trail of this Government persecution of Lt. Choi led—like the Watergate tapes snaked their way back to President Nixon—directly to President Obama himself, who was/is not only personally opposed to Gay equality, but was, as the self-described legacy of Dr. Martin Luther King, Jr., deeply humiliated by being criticized by Lt. Choi and others for enforcing discriminatory laws (like "Don't Ask, Don't Tell") against Gay Americans.

Needless to say, after all of this came out during Lt. Choi's ongoing criminal trial and Lt. Choi promptly mid-trial subpoenaed the Government agencies ostensibly involved (the U.S. Park Police and the U.S. Secret Service) for relevant documents and subpoenaed one of their officials to testify, and U.S. District Court Magistrate Judge John M. Facciola ruled he would allow Lt. Choi to pursue a selective/vindictive-prosecution defense based on the evidence, the Government became apoplectic that its persecution would be fully exposed. Even though Judge Facciola specifically found that the evidence that had been exposed thus far during the trial had made out a *prima facie* case for selective/vindictive prosecution, the Government declared that it wanted to seek mandamus to prevent Judge Facciola from allowing Lt. Choi to pursue the selective/vindictive-prosecution defense. Judge Facciola then continued the trial for 10 days to allow the Government time to file for mandamus.

The Government has now filed its putative "petition"[1] for mandamus in this Court, *within* the existing criminal case against Lt. Choi. However, the Government's "petition" is predictably

[1] "Petition" is in quotes throughout this brief to emphasize, as discussed below, that the Government's submission of that title is entirely a creature of the Government's creation and not

nothing more than a frivolous[2] attempt to prevent complete exposure of its profoundly-undemocratic wrongdoing against Lt. Choi and others in this case. The Government's "petition" is procedurally and substantively flawed, and should be dismissed or denied, for the following reasons.

STATEMENT OF FACTS & PROCEDURAL HISTORY

It is the *Government's* burden to demonstrate that its "petition" should be granted, and thus the *Government's* burden to provide a properly supported (record-cited) "petition" to begin with. The Government does not support, with citations to the record, the majority of its assertions in its "petition's" Preliminary Statement, Statement of Facts, and Procedural History. See "Petition" at 1-5, 6-19. In particular, the Government does not even attach to its "petition" any trial transcripts or relevant portions thereof, or crucial trial exhibits like the Park Police video of Lt. Choi's arrest (Govt. Ex. # 2)—outrageously expecting the Court to "like [a] pig[], hunt[] for truffles buried" in the record, Potter v. District of Columbia, 558 F.3d 542, 553 (D.C. Cir. 2009) (Williams, S.J., concurring), if they are in the record at all which many of the Government's assertions are not. Thus the Government's "petition" fails on that account alone and should be denied. Therefore, in this Response, Lt. Choi merely generally denies the

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of the Rules or law. There is no such thing as a petition for mandamus at the district-court level and within the District Court, *i.e.*, from district-court judge to district-court magistrate judge.

[2] The Government's "petition" is frivolous not only because the Government is obviously not entitled under the law to have its "petition" granted, but because the Government in its "petition" completely violates the ethical and pleading standards for presenting a filing to the Court. For example, as just stated, the Government does not bother citing to the record for many of its assertions. Even worse, the Government makes factual assertions in its "petition" that are directly contradicted by the evidence including that just adduced at trial two weeks ago. The Government also mischaracterizes and/or omits evidence, procedural events, Lt. Choi's actual full defense, cases, and the law—all in a desperate effort to avoid compliance with Judge Facciola's decision which will expose its wrongful conduct against Lt. Choi and others.

Government's Preliminary Statement, Statement of Facts, and Procedural History, and only addresses any specific Government assertion when necessary for his arguments.[3]

However, in order prefatorily to show that the Government's "petition" is entirely suspect to begin with, two false assertions by the Government as to basic facts of the underlying arrest-incident of the case will now be addressed briefly. In the second sentence on page 1 of its "petition," the Government states to this Court that on November 15, 2010, "defendant . . . refused to leave the area in response to three orders given by the United States Park Police . . . ." In fact, as was demonstrated at trial and as was even repeatedly admitted by the Government at trial, the orders which the Government allegedly gave Lt. Choi and which he allegedly disobeyed were for him to leave "the sidewalk"—not the "area." See 11/15/10 Video (Govt. Trial Ex. # 2) (showing orders were to leave the "sidewalk"); U.S. Park Police Lieutenant Robert LaChance (Park Police incident commander on November 15, 2010, who allegedly gave the orders), 8/29/11 a.m. Tr. at p. 74 lines 9-12 (testified his orders to Lt. Choi were: "You must leave the closed portion of the White House sidewalk now. All persons remaining on the closed portion of the White House sidewalk will be arrested."); U.S. Park Police Captain Philip Beck (Park Police watch commander on November 15, 2010), 8/31/11 a.m. Tr. at pp. 26-27 (testified orders were to leave the "sidewalk"). The difference is crucial because, as was demonstrated at trial and as was even repeatedly admitted by the Government at trial, Lt. Choi was not on the sidewalk when the orders were allegedly given, nor when he was arrested, nor any time in-between. See Govt. Ex. # 2; AUSA Angela George to Judge Facciola, 8/29/11 a.m. Tr. at p. 109 lines 15-18 ("Well, 36 [CFR] 7.96, Your Honor, specifically defines the White House sidewalk, and it does not include

[3] One false Government assertion that will be addressed now in "housekeeping" is the Government's assertion, see "Petition" at 9, that "In April 2011, the parties reached a resolution." In fact, Lt. Choi never agreed to nor authorized his counsel to agree to the Government plea offer—either in April or any time else.

the ledge and/or what people refer to as the masonry base."); U.S. Park Police Officer Cameron Easter (participated in the arrest of Lt. Choi on November 15, 2010), 8/29/11 a.m. Tr. at p. 19 (Lt. Choi and the other protestors "got up on the ledge that the White House fence is on"); AUSA George to Lieutenant LaChance, 8/29/11 p.m. Tr. at p. 14 ("Earlier you told the court that you made the decision to arrest the 13 individuals, including Mr. Choi that was standing on the ledge."); Defense Counsel Robert J. Feldman and Lt. LaChance, 8/29/11 p.m. Tr. at 51 lines 21-23 (MR. FELDMAN: When you told him through the bullhorn, "Get off the sidewalk," was he on the sidewalk? LT. LACHANCE: He was on the ledge.), at p. 53 lines 10-12 (MR. FELDMAN: But you told them to get off the sidewalk when he's on the ledge, correct? LT. LACHANCE: Yes Sir. MR. FELDMAN: How can you get off the sidewalk when you're not on the sidewalk? LT. LACHANCE: Point taken.). Lt. Choi simply could not have disobeyed an order that did not apply to him to begin with.

In other words, as the Government has known since it arrested Lt. Choi on November 15, 2010, the Government can simply never prove that Lt. Choi disobeyed the orders[4]—and thus the Government's charge of failure to obey an order was baseless to begin with. This is, not coincidentally, why, in its "petition," the Government carefully but deceptively avoids ever quoting the Park Police's express alleged orders, and arranges its words (particularly in that second sentence) to have the Court *infer* orders which were not actually given but which suggest disobedience on Lt. Choi's part.

Second, in the first and third sentences on page 6 of its "petition," the Government states to this Court that on November 15, 2010, "defendant and twelve other individuals [later arrested with defendant] . . . formed a group on the north side of Lafayette Park" and "walked in pairs

[4] Much less that he disobeyed "lawful" orders.

side by side through Lafayette Park, crossed Pennsylvania Avenue, and continued to walk onto the White House sidewalk." In fact, as the evidence at trial demonstrated, this rendezvous as the Government describes it did not happen. Some of the twelve individuals arrested with Lt. Choi arrived separately to the White House sidewalk from the direction of the Treasury Department building. See Captain James E. Pietrangelo, II, 8/30/11 p.m. Tr. at pp. 7-8 ("we didn't go as one group. We did break up. I don't, I think it was in either two groups or three groups, I don't recall the exact number of groups. I was in one group with several individuals.") ("The other 13 people were—the 13 people who got arrested were in the other groups as well as with my group."), 8/30/11 a.m. Tr. at 29 (After getting off the Metro, my "group continued on to the White House. We approached from the Treasury Department side along Pennsylvania Avenue, and at that point we proceeded towards the White House fence. Where we joined the other individuals participating in the speaking.").

These material Government falsehoods fresh on the very heels of the trial are important because they beg the question: If the Government blatantly misrepresents material facts in seeking relief from this Court, how can—and why should—this Court even hear its arguments to begin with? The Court should reject the Government's "petition" out of hand for these falsehoods.

REASONS WHY THE PETITION SHOULD BE DISMISSED/DENIED

The Government's "petition" should be dismissed or denied for the following reasons.

SUMMARY OF ARGUMENT

The Government's "petition" should be dismissed or denied because the D.C. Circuit, in United States v. Washington, already approved of what the Government claims Judge Facciola

did in this case, and thus there is no grounds for relief to begin with. Moreover, there is no jurisdiction for mandamus to issue in this particular case to begin with, because mandamus is not available *intra*-court—that is, from one judge in a given court (District, Circuit, or Supreme) to another judge in the same court—nor available under the All Writs Act at the *district*-court level.

In any case, the Government's "petition" should be denied, because the elements for mandamus are not satisfied. First, the Government had alternative relief: an appeal to this Court. Second, the Government suffers/ed no harm from Judge Facciola's decision because, among other reasons, the Government had an opportunity pretrial to try to develop a rebuttal case to selective (vindictive)-prosecution and squandered it, and Judge Facciola gave the Government a second opportunity at trial to do so after he decided to let Lt. Choi pursue a selective/vindictive-prosecution defense. Third, the Government had no right to have Judge Facciola preclude Lt. Choi's selective/vindictive-prosecution defense at trial, as such a trial defense was squarely within Judge Facciola's discretion to allow. Judge Facciola had specifically deferred the issue of a selective-prosecution defense to trial, and additionally Lt. Choi did not have sufficient *prima facie* evidence of selective/vindictive prosecution until the Government disclosed certain evidence of it at trial. And the evidence at trial clearly adduced a *prima facie* case of selective/vindictive prosecution—showing that the Government's entire case—even its prosecutor's venomous conduct at trial towards the Defense—has been in persecution of Lt. Choi for daring to criticize President Obama.

Finally, the Government has "dirty hands" and should not be granted mandamus regardless of the elements of mandamus. Besides the fact of the outrageous persecution itself, the Government, in total disrespect for Judge Facciola, neglected preparation of its case literally until the last minute, and then had the gall to blame *Judge Facciola* for its neglect when that

neglect came back to bite it at trial. The Government also withheld material from the Defense that it had a duty to disclose.

ARUMENT

I. The Petition Is Precluded Under United States v. Washington

As will be shown momentarily, the Government's "petition" totally fails under a mandamus analysis. However, the Court need not even go to the labor of such an analysis in order to find the Government's "petition" without merit. The Government's "petition" is precluded by United States v. Washington, 705 F.2d 489, 227 U.S. App. D.C. 184 (D.C. Cir. 1983). In that case, the D.C. Circuit—as best as can be determined from the face of the decision—approved of exactly what the *Government* argues Judge Facciola did in this case: allow a criminal defendant to at trial pursue—after introduction of evidence tending to show selective prosecution—a selective-prosecution defense, including by obtaining immediate discovery—for use at the ongoing trial—of documents and testimony from the Government relevant to the defense. See *id.* at 494-495:

> The trial court permitted discovery after the defendant introduced evidence suggesting a link between United States foreign policy and the Israeli government's efforts to solve problems it believes it has with Black Hebrews already settled in Israel. The trial court directed the government to supply appellant with information demonstrating how many passport frauds were detected since 1975, how many detected frauds were prosecuted and how many frauds detected or prosecuted involved Black Hebrews. The government produced most of the statistical information requested by the trial court, and following three days of testimony on this question, the trial court ultimately determined that appellant had not proved her claim of selective prosecution. In reaching this finding the trial court concluded that no records existed to demonstrate specifically how many Black Hebrews were involved in passport frauds or the disposition of those cases involving Black Hebrews suspected of committing passport fraud. Any conflicts that may have existed in the testimony on the selective prosecution

> claim were correctly resolved by the trial court in the government's favor.
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> *** Indeed, it appears that the court more than adequately protected appellant's right not to be improperly singled out for prosecution.

Since the D.C. Circuit approved[5] of what the Government argues Judge Facciola did, the Government cannot obtain relief from it.

II. The Petition Fails Under a Mandamus Analysis

Even under a full mandamus analysis, the Government's "petition" fails, for the following reasons.

a. Lack of Jurisdiction for Mandamus

First, respectfully, this Court lacks the jurisdiction to grant the Government's "petition." Administrative mandamus lies from a U.S. District Court to "an officer or employee of the United States" Government,[6] 28 U.S.C. § 1361, and appellate mandamus lies from a U.S. appellate court to an inferior U.S. court,[7] see 28 U.S.C. § 1651; Schlagenhauf v. Holder, 379 U.S. 104, 109-110 (1964); In re Tennant, 359 F.3d 523, 528, 360 U.S. App. D.C. 171 (D.C. Cir. 2004), but no type of mandamus lies from one judge of a U.S. District Court to another judge—even a magistrate judge—of that *same* U.S. District Court. That is because both judges *are* the U.S. District Court—in fact, under 18 U.S.C. § 3401, a magistrate judge is for all intents and

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[5] The Government ignores this apparent part of the U.S. v. Washington opinion—in fact citing U.S. v. Washington for the contrary proposition that "Permitting a defendant to present selective or vindictive prosecution as a trial defense to the charged crime is legal error." "Petition" at 22; see, also, *ibid* ("See Washington, 705 F.2d at 495 (rejecting claim that selective prosecution should have been decided by jury and not by trial court).").

[6] *I.e.*, Executive Branch personnel.

[7] In the case of the Supreme Court, also to "persons holding office under the authority of the United States, where a State, or an ambassador, or other public minister, or a consul, or vice consul is a party."

purposes the supervising district-court judge by extension[8]—and there is no statutory or common-law authority for *schizophrenic* process: for a U.S. District Court to order itself to do something. It is an impossibility. A writ simply contemplates a *separate* superior judicial body exerting control.

Moreover, besides mandamus not being available *intra*-court, mandamus by a *District* court is not permitted under 28 U.S.C. § 1651, the All Writs Act—the statute on which the Government relies for its "petition." The All Writs Act states that "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." By law, "The writs of scire facias and mandamus are abolished" in district-court practice. FRCP 81(b).

Indeed, no court has apparently ever held that the All Writs Act applies at the district-court level. The Government cites two cases for such a proposition, but neither case bears the weight that the Government puts on it. In fact, the Government really misrepresents the import of these cases. In Washington Post v. Robinson, 935 F.2d 282 (D.C. Cir. 1991), neither the applicability nor the propriety of Section 1651 mandamus at the district-court level was at issue. Washington Post was a D.C. Circuit case heard *on normal appeal* of a magistrate-judge-district-court-judge-affirmed order denying a motion to intervene. On appeal, the D.C. Circuit merely noted in passing that in addition to appealing the magistrate's order to the district-court judge, the plaintiff had sought review at the district-court level by petitioning the district-court judge for mandamus, and had been denied. The D.C. Circuit never reached the mandamus-denial issue. It is not even apparent from the face of the Washington Post decision under what statute the plaintiff sought mandamus from the district court, nor why the district court denied mandamus.

[8] Which is why all appeals of or objections to magistrate-judge decisions go to the supervising district-court judge first. See, *e.g.*, 18 U.S.C. § 3402; FRCrP 58(g)(2); FRCrP 59.

The reason for denial well could have been lack of jurisdiction for mandamus at the district-court level.

In the Government's second case, United States v. Lee, 786 F.2d 951 (9th Cir. 1986), also involving relief sought dually by appeal and petition at the district-court level, the non-issue of mandamus was even more explicit. See *id.* at 956 ("To cover all bases, the government also suggests that this court may assume jurisdiction under the All Writs Act, 28 U.S.C. § 1651, by treating the appeal as a petition for a writ of mandamus. We need not reach that issue.").

Thus, the Government's two isolated instances of *attempted* but unsuccessful petition for mandamus at the district-court level do not a "procedural practice"—as the Government absurdly claims, see "Petition" at 5—make.

Non-original-action mandamus is so utterly non-existent at the district-court level that tellingly the Federal Rules of Civil/Criminal Procedure do not even have rules prescribing a petition procedure, such as what the format of any petition must be. They have rules pertaining to "complaints" and "motions," but not "petitions"—which is not surprising again given that mandamus was expressly abolished there. In contrast, both the Rules for the Courts of Appeal and the Rules for the Supreme Court—to which Courts the All Writs Act has traditionally been applied—do specifically provide for "petitions." See FRAP 21; Supreme Court Rule 17.1.

Thus, in the instant case, the Government—as far as seeking *mandamus* goes—could only—assuming it had already *appealed* to this Court and was denied—petition for mandamus against Judge Facciola's decision mid-trial to allow Lt. Choi to pursue a selective/vindictive-prosecution defense to the *D.C. Circuit*. Indeed, Judge Facciola himself expressly continued the trial under the expectation that the Government would petition to the D.C. Circuit. See The Honorable John M. Facciola, 8/31/11 p.m. Tr. at p. 13 ("This is for the Court of Appeals so it is

none of my business."), at p. 15 ("Do we all agree that in courtesy to the Court of Appeals I should suspend so she can file the Writ . . . ."), at p. 24 ("I will as a courtesy to the Court of Appeals continue this matter for 10 days within which for you seek your writ of mandamus."). Since this Court obviously is not the D.C. Circuit, this Court must dismiss the petition. This Court may not exercise a power—the power to issue a writ of mandamus to itself—which it does not and cannot possess. See Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 377 (1994) ("Federal courts['] ... limited jurisdiction ... is not to be expanded by judicial decree."); United States v. Morgan, 346 U.S. 502, 506 (1954) (power of a federal court to grant a writ must be specifically authorized by Congress); In re Cheney, 406 F.3d 723, 729, 365 U.S. App. D.C. 387 (D.C. Cir. 2005) ("Jurisdiction over actions 'in the nature of mandamus' under § 1361, like jurisdiction over the now-abolished petitions for writs of mandamus, is strictly confined").

b. Lack of The Elements of Mandamus

Second, even if this Court had jurisdiction for mandamus in this particular situation, the Government has not, and cannot, meet the *stringent* standard for that very mandamus. A writ of mandamus "is an extraordinary remedy, to be reserved for extraordinary situations." Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988). "[M]andamus is 'drastic'; it is available only in 'extraordinary situations'; it is hardly ever granted; those invoking the court's mandamus jurisdiction must have a 'clear and indisputable' right to relief; and even if the plaintiff overcomes all these hurdles, whether mandamus relief should issue is discretionary." In re Cheney, 406 F.3d 723, 729, 365 U.S. App. D.C. 387 (D.C. Cir. 2005) (citation omitted). Mandamus does not lie unless there is "no other adequate means" by which the petitioner may attain relief. In re Sealed Case, 151 F.3d 1059, 1063, 331 U.S. App. D.C. 385 (D.C. Cir. 1998). The instant case is not such an extraordinary situation.

1. No Lack of Other Adequate Means of Relief

The Government clearly *had* adequate means other than mandamus to seek relief in this case, although that other means is now foreclosed. The Government could have by September 14, 2011,[9] under FRCrP 58(g)(2),[10] appealed to this Court Judge Facciola's mid-trial decision to allow Lt. Choi to pursue a selective/vindictive-prosecution defense. *Cf.* Cole v. U.S. District Court for the District of Idaho, 366 F.3d 813, 818, 822-823 (9th Cir. 2005) ("It is uncontested that petitioners could have, but did not, move for reconsideration of the magistrate judge's ruling with the district court . . . . *** Were we to ignore this simple and direct route open to petitioners for review of the disqualification order, we would be improperly placing our court, rather than the district court, in the role of supervising the magistrate judge's decisions. Petitioners had a ready remedy with the district court, but did not pursue it. *** That petitioners did not avail themselves of review in the district court strongly counsels against our issuing the writ."); Califano v. Moynahan, 596 F.2d 1320, 1322 (6th Cir. 1979) (to same effect); United States v. Ecker, 923 F.2d 7 (1st Cir. 1991) (to same effect). The Government, it is true, filed a "petition" before September 14, 2011, but a "petition" for mandamus is not an "appeal"—as Washington Post and Lee abundantly demonstrate. Indeed, an appeal and a mandamus-petition each has a different standard than the other, and cannot be treated interchangeably.

Moreover, even assuming that the Government *had* appealed to this Court—which is not the case—the Government then also could have upon final order/judgment of this Court

[9] Fourteen days from August 31, 2011—the date of Judge Facciola's decision to allow Lt. Choi to pursue the selective/vindictive-prosecution defense.

[10] "Either party may appeal an order of a magistrate judge to a district judge within 14 days of its entry if a district judge's order could similarly be appealed. The party appealing must file a notice with the clerk specifying the order being appealed and must serve a copy on the adverse party."

normally appealed[11] to the D.C. Circuit—as for example the very plaintiff in Washington Post did, and the Government itself in Lee did. Mandamus is simply not to be used as a substitute for the normal avenues of appeal. See Doe v. Exxon Mobil Corp., 473 F.3d 345, 353, 374 U.S. App. D.C. 205 (D.C. Cir. 2007).

Despite the obvious alternative relief, the Government still tries, by engaging in mental gymnastics, to argue that it qualifies for mandamus. The Government argues that it has no appeal *if*[12] Judge Facciola ultimately acquits Lt. Choi on the grounds of selective/vindictive prosecution. See "Petition" at 25 ("if the magistrate court considers vindictive prosecution as a defense to the charge of failure to obey a lawful order—as it has indicated it will—an acquittal on that ground would preclude the government from exercising its statutory right to appellate review" and "For that reason, there is 'no other adequate means' by which the government may obtain relief from the magistrate's court error, other than mandamus."). But the decision from which the Government itself admits[13] it must now show it has no other means of relief to qualify for mandamus is Judge Facciola's already-made mid-trial decision simply to allow Lt. Choi to pursue a selective/vindictive-prosecution defense—not any potential future decision of Judge Facciola to favorably dispose of the charge in Lt. Choi's favor on that grounds. The decision to allow Lt. Choi to pursue the defense is the operative decision for purposes of mandamus analysis.

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[11] Including under the "appealable collateral-order" doctrine.

[12] *If* humans had wings they would be birds, but that does not mean the airline business is going out of business anytime soon.

[13] "Petition" at 18 ("Again seeking clarification, government counsel asked if the defense was going to be allowed to pursue the theory posited by the magistrate court as a theory of defense, and the UMSJ responded 'yes'[.]"; at 5 ("The magistrate's consideration of either selective prosecution or vindictive prosecution as a defense to the charge of failure to obey a lawful order is clear error for which no adequate remedy other than mandamus exists.").

Indeed, the Government *could not* even seek mandamus on any potential ultimate decision of Judge Facciola, because it is just a potential decision. (There is an obvious problem of standing.) Judge Facciola could ultimately rule in the Government's favor on the selective/vindictive-prosecution defense. All that Judge Facciola has held thus far is that Lt. Choi has made out a *prima facie* case of selective/vindictive prosecution. See The Honorable John M. Facciola, 8/31/11 a.m. Tr. at p. 71 ("The Court hasn't made a ruling yet. It's a prima facie case that's sufficient to convince me that there should be a legitimate inquiry into the decision-making process that led to the conclusion that in November charges would have been brought that were different from the charges that were brought in March and April, both in their nature and in their consequence."). In the event—however unlikely—that the Government successfully rebuts that case during the rest of trial, there will be nothing left for it to seek relief from. And, again, as to the operative decision—the mid-trial decision to let Lt. Choi pursue a selective/vindictive-prosecution defense—the Government certainly *had* an adequate means of relief: *appeal* to this Court, and then to the Circuit Court.

Moreover, it simply is not true that an actual disposition of the charge by Judge Facciola in Lt. Choi's favor on selective/vindictive-prosecution grounds would be an *acquittal* that would bar Government appeal, see Arizona v. Manypenny, 451 U.S. 232, 246 (1981) ("the constitutional ban against double jeopardy [only] bars an appeal by the prosecutor following . . . acquittal."). Since, as the Government itself takes pains to admit, see "Petition" at 20, a selective/vindictive-prosecution is not on the merits of the charge, any disposition by Judge Facciola of the charge based on selective/vindictive prosecution would be a *dismissal*—not an *acquittal*. See United States v. Scott, 437 U.S. 82, 97 (1978) ("For double jeopardy purposes, a dismissal is not an acquittal if the 'ruling of the judge, whatever its label, [does not] actually

represent[] a resolution in the defendant's favor, correct or not, of some or all of the factual elements of the offense charged.'" (Internal citation and quotation marks omitted).

And, despite the Government's assertion to the contrary, see "Petition" at 5 ("Although the government has a statutory right to appeal the dismissal of criminal charges under 18 U.S.C. § 3731, the availability of that remedy has been infringed by the USMJ's decision to consider selective and/or vindictive prosecution as a trial defense after jeopardy has attached, rather than as a pretrial challenge to the constitutionality of the prosecution."), the Government would have (had) an appeal from such a dismissal *even though trial had already begun*. Under 18 U.S.C. § 3731, "an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information . . . except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution." Double jeopardy does not prohibit further prosecution after successful appeal by the Government of an erroneous legal dismissal during trial. See Unites States v. Scott, *supra*.

Thus, for example, in State of Ohio v. Calhoun, 18 Ohio St. 3d 373 (1985), the Ohio Supreme Court, citing United States v. Scott, found that double jeopardy had *not* attached after the judge mid-trial dismissed the indictment on legal grounds—that the indictment was unconstitutionally vague—and the prosecutor successfully appealed that dismissal. The Ohio Supreme Court stated:

> [T]he record in this case indicates that the trial court's reasoning for terminating the proceedings was not premised upon the insufficiency of the prosecutor's evidence. The trial judge likewise did not determine that appellee was innocent of the underlying count.
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> Rather, the court made a ruling on a point of law that resulted in the termination of the case, *i.e.,* that the statute underlying the indictment was unconstitutionally vague. Notedly, this is not a case in which the prosecution has sought to use its superior resources to wear the defendant down by submitting the matter to successive tribunals in

> the hopes of securing an eventual conviction. *Scott, supra,* at 87. *** At least in the absence of an acquittal or a termination based on a ruling that the prosecution's case was legally insufficient, no interest protected by the Double Jeopardy Clause precludes a retrial when reversal is predicated on trial error alone. See, generally, *Burks* v. *United States, supra;* cf. *Sanabria* v.. *United States* (1978), 437 U.S. 54. The purpose of the Double Jeopardy Clause is to preserve for the defendant acquittals or favorable factual determinations but not to shield from appellate review erroneous legal conclusions not predicated on any factual determinations.

Id. at 376 -377.

In State v. Lee, 180 Ohio App. 3d 739, 745-747, 2009-Ohio-299 (3rd Appellate Dist. Van Wert Cty. 2009), the Ohio appeals court reached the same conclusion regarding the trial court's erroneous mid-trial ruling that the indictment was defective—the same type of ruling that the Government argues would exist in the instant case[14]:

> Accordingly, the State is correct in its assertion that the indictment was not defective and the trial court should not have dismissed it. However, Lee has argued that, even if the trial court erred in dismissing the aggravated robbery count, this Court should not reverse and remand the case. It is Lee's position that jeopardy attached when the jury was sworn, and, therefore, another prosecution of him for this offense is barred by double jeopardy and remand would be pointless.
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> . . . the trial court dismissed the indictment midtrial based on an erroneous legal conclusion. No determination of factual guilt or innocence was made. Accordingly, we find that double jeopardy would not bar Lee's retrial on the aggravated robbery count, and remand is appropriate.

The Government simply had other means of relief, and thus mandamus is inappropriate.

2. Lack of Harm

There simply was/is/will be no irreparable harm, or even any legally-cognizable harm, to the Government, justifying departure from the normal course of appeal, from the mere mid-trial

[14] The Government argues that selective prosecution is a defect in the information/indictment. The D.C. Circuit has never held so.

decision of Judge Facciola to allow Lt. Choi to pursue a selective/vindictive-prosecution defense. See Banks v. Office of the Senate Sergeant-at-Arms, 471 F.3d 1341, 1350, 1348, 374 U.S. App. D.C. 93 (D.C. Cir. 2006) (mandamus denied because the district court's decision that the defendant had no sovereign immunity from discovery sanctions did not cause "irreparable injury" sufficient to short-circuit the normal appeal process). Judge Facciola's decision merely requires the Government to provide discovery of material relevant to selective/vindictive prosecution, *subject* to any privilege which the Government raises *and* Lt. Choi cannot then legally overcome. As the Government's own "petition" indicates, Judge Facciola—after indicating he would allow Lt. Choi to pursue the defense—specifically asked the Government "what, if any, privileges you intend to assert[?]". "Petition" at 17 (quoting 8/31/11 a.m. Tr. at p. 8). As the Government's own "petition" also indicates, Judge Facciola at that time also indicated that he would allow the Government discovery to try to rebut the *prima facie* case. See "Petition" at 18 (quoting 8/31/11 p.m. Tr. at 5) ("I, therefore, will permit both sides to elicit evidence as to the difference in his treatment on those three occasions.").

Indeed, the Government was/is free to try to rebut the selective/vindictive prosecution if it so desired/s. Simply because the Government *cannot* rebut the defense—because the Government is full-on guilty of persecuting Lt. Choi—is not a type of harm cognizable under mandamus jurisprudence. In fact, the Government *waived* any objection it had to selective/vindictive prosecution being raised at trial or mid-trial, by admittedly repeatedly engaging in preemptive questioning of its own witnesses on their motive in arresting and charging Lt. Choi. See, *e.g.*, AUSA George and The Honorable John M. Facciola during direct of U.S. Park Police Officer Jerome Stoudamire, 8/29/11 p.m. Tr. at p. 130 (MS. GEORGE: "The Court has decided to take the [Government's] motions [in limine against a selective-prosecution

defense at trial] under advisement, so the Government is asking questions. THE COURT: Ms. George, for the last time, you were not obliged to anticipate any defense."); see, also, 8/31/11 a.m. Tr. at 58-59, 70 (one of previous times that AUSA George had asked a preemptive selective-prosecution question, of U.S. Park Police Cpt. Philip Beck). The Government may not "have its cake and eat it too."

Moreover, the Government *cannot* claim irreparable harm, in that the *Government* brought—and insists on maintaining, see 11/31/11 p.m. Tr. at 8, this federal charge against Lt. Choi. The Government cannot cry *substantive* foul simply because Judge Facciola allowed Lt. Choi to exercise his constitutional right to defend himself from the Government's charge.

Knowing that it does not have a leg to stand on regarding this additional mandamus-issue (alleged harm), the Government again resorts to gymnastics to make its case—concocting imaginary harms out of thin air. The Government asserts as its main harm the alleged lack of an appeal from an acquittal on selective/vindictive-prosecution grounds—the same alleged lack of appeal which it used as a "lack of other adequate means," as discussed above.[15] Since this assertion failed the first time, it fails the second time now as well.

The Government also asserts that "by allowing the defendant to elicit evidence that he claims supports a defense of selective or vindictive prosecution, the magistrate court has severely hampered the government's ability to rebut these claims." "Petition" at 25. Specifically, the Government argues that lack of pretrial "notice of the claim" of selective/vindictive prosecution "has made it difficult for the United States to ascertain what witnesses or other evidence . . . it may need to gather and present to rebut the defendant's vague claims." *Id.* at 25-26. The Government also claims harm because allegedly the "'prima facie' case described by the

[15] You know the Government is "in trouble" making its case when it starts conflating mandamus elements or having mandamus arguments do "double duty."

magistrate court does not appear to fall within the scope of the vindictive–prosecution doctrine." *Id.* at 26. The Government also claims harm from allegedly being "in the position of defending against a moving target, created by the defense and the magistrate court positing new theories as the case proceeded." *Id.* Finally, the Government alleges that an acquittal of Lt. Choi by Judge Facciola on selective/vindictive-prosecution grounds would "cause irreparable damage to the reputation of the United States Attorney's Office, as it would directly attack the very integrity of the institution." *Id.* All four of these asserted harms are without merit if not frivolous.

As to the Government's second asserted harm, there simply can be no harm to the Government simply because the Government *asserts* that the evidence does not support a selective/vindictive-prosecution finding in this case. Even if the Government *correctly* asserts—which it does not—that the evidence does not support a (*prima facie*) selective/vindictive-prosecution finding, such a correct assertion—or the attendant erroneous finding—would not be a harm. It might *cause* a harm which would have to be identified by the Government, but it would not be a harm in and of itself. It would simply be the "error" part of the mandamus analysis—not the "harm" part.[16]

As to the Government's third asserted harm, the Government is merely restating its first asserted harm to fill out its "harm" argument.[17] That the Government allegedly is improperly being suddenly exposed to defenses at trial is the same thing as allegedly improperly not being given notice pretrial of those defenses. (Alleged) "surprise" *is* (alleged) "lack of prior notice." They are different time aspects of the same alleged harm. Moreover, Lt. Choi's selective/vindictive-prosecution claim is simply not as the Government claims "vague." Lt. Choi stated it clearly. See, *e.g.*, Lt. Dan Choi, 8/30/11 p.m. Tr. *passim*, and at p. 63 (testified that

[16] The Government is again caught "bootstrapping" to beef up its defective "petition."
[17] Yet further "bootstrapping."

Government charged his two previous arrests after chaining himself to the White House fence in March and April 2010 as municipal traffic-violations, and then ultimately dropped the charges), at pp. 37-44 (testified how his prominence as a Gay-civil-rights activist increased after the first two arrests and the dropped charges), at pp. 86-87 ("I think that when our experience shows very clearly that Captain Pietrangelo and myself, Lieutenant Choi, were arrested in both March and in April 2010, we were not before a federal court. We did not face you. We did not face a wired plea deal. We did not face six months in prison. We did not face a $5,000 fine. In fact, because we pled not guilty, the D.C. Municipal Court, where I believe this court case belongs, although it is here and I'm happy to be here, I think that based on personal experience, no, I would not even say the regulations could tell me that I belong here. I would say that the charges, as they were dropped, would be dropped again in November. And any rational human being will realize that if you've done something twice, you have the audacity to do something twice and you don't get punished, there must be a reason why you didn't get punished. And I don't know what that reason was, but a rational human being can deduce that the charges being dropped after a plea of not guilty, unless we pled guilty, it wouldn't be unlawful. So, it is not unlawful to do what we did and I don't know why I'm here right now."), at pp. 92-93 (testified how November 15, 2010 protest was strident whereas March and April ones were stoic), at p. 78 (testified that November 15, 2010 protest was "uninhibited, robust and wide open"), at p. 76 (explaining how November 15, 2010 protest was different) ("And when we had more people join us the next time, it was, in fact, not a carbon copy, but the corollary to the Greensboro lunch counter sit-ins at the Woolworth department store."); Govt. Ex. # 2 (showing strident speech of Lt. Choi directed at President Obama, and showing military-veteran protestors now with civilian protestors, in contrast to first two protests); see, also, Cpt. Pietrangelo, 8/30/11 a.m. Tr. at pp. 84-85 (testified

that by third protest Lt. Choi had an MLK, Jr. stature—including from his prior arrests—among Gay activists that gave him the gravitas to inspire increasingly more protestors; that Lt. Choi was the leader of the third protest), at p. 35 (testified that third protest was strident and speaking directly to President Obama).

And Judge Facciola—who found that Lt. Choi had stated the selective/vindictive-prosecution claim clearly—re-stated it clearly for the Government. See The Honorable John M. Facciola, 8/31/11 p.m. Tr at p. 5 ("The issue presented by the testimony of the defendant yesterday in my view creates a prima facie case for the proposition that the difference in the manner in which he was prosecuted for his behavior in November as opposed to his behavior in March and April would permit the inference that that difference was a function of the nature of his speech or what he said. It would then follow that the difference in treatment would (a) violate the due process clause because it is vindictive; and (b) independently constitute a violation of the First Amendment because it is predicated on his speech."), at p. 6 ("the defendant has so testified. The defendant said you treated me differently as a function of what I said. That is, when I said X, Y and Z and behaved myself in a certain way, you treated me one way. When, in November, I did just about the same thing–that is a question of dispute, but anyway prima facie—he said, when I did the same thing, you treated me differently. The motivation for the difference in treatment had to do with what I said. First, you violated my rights under the due process clause because you treated me differently without a legitimate justification that would stand analysis under the due process clause which, as far as the federal government goes, since the decision in Bolling versus Sharp includes equal protection. So, the second thing he is saying is that your prosecution of me in November was vindictive. It was different. for you to do it. I submit, he says, I submit that the real reason is, by then, you were offended by the nature. And

there is no rational reason of what I was saying, by my speech. Therefore, by prosecuting me in a different way, you punish me for exercising my First Amendment right. Therefore, that is also a second violation of the Constitution of the United States."), at p. 19 ("The defendant's position is: I said something in March, I said something in April and I said something in November. The reason I was treated in November differently from the March and April is, by November, I began to offend the United States by what I was saying to the point that they treated me differently; and therefore, my rights under the First Amendment and the Fifth Amendment were violated.").

As to the Government's fourth asserted harm, the Government is stating a principle so utterly contrary to American jurisprudence that the Government's "petition" should be rejected on that basis alone. That the United States Attorney's Office would suffer a loss in reputation for having *persecuted* Lt. Choi is not a recognized harm in our democracy but a recognized consequence *of* our democracy. When in a democracy government officials are found to have engaged in wrongdoing, they are properly held to account, including by public condemnation.

That just leaves the Government's first asserted harm—that it has been denied an opportunity to obtain evidence in rebuttal of a selective/vindictive-prosecution defense—and this too is thoroughly specious. First of all, the Government's argument incorrectly presumes that there *is* such rebuttal evidence to be obtained—there isn't, because the Government indisputably persecuted Lt. Choi. Second, the Government already had plenty of opportunity to investigate selective/vindictive prosecution in this case. At Lt. Choi's arraignment on March 18, 2011, the Government first had clear notice that selective prosecution was at issue in the case as a defense. At that arraignment, after Judge Facciola noted the unusually heightened federal charge and cited Shuttlesworth v. Birmingham (a watershed selective-prosecution case), Lt. Choi's then-lead-counsel, Mark Goldstone, indicated that Shuttlesworth applied and that the Government was

treating Lt. Choi and his fellow arrestees differently from normal practice including in Lt. Choi's previous arrests. See 3/18/11 Tr. *passim* and at pp. 9-19, 28. Critically, Mark Goldstone has for years regularly represented White House protestors before D.C. courts, and would certainly be able to recognize the difference.

The Government then had confirmation, on August 24, 2011, and August 25, 2011, respectively, of the selective-prosecution defense. The Government itself admits that during an August 24, 2011 phone call, Lt. Choi's current-lead-counsel, Robert J. Feldman, specifically told AUSA Angela George that the "defendant would be claiming that the government selectively prosecuted him because of his sexual orientation and his Anti-Obama perspective." "Petition" at 11. The Government also admits that during an August 25, 2011 phone-conference between Mr. Feldman, AUSA George, and Judge Facciola, Mr. Feldman asked Judge Facciola to take judicial notice of photographs of the Osama bin Laden-death rally in front of the White House that Mr. Feldman had indicated went to selective-prosecution, and Judge Facciola did so take notice.[18]

Indeed, the Government admits that during the August 25, 2011 phone-conference, Judge Facciola himself told the Government that selective prosecution remained on the table for trial as an issue. See "Petition" at 12 (partially quoting 8/25/11 Tr. at 10-11) ("Later during the status hearing, when the government returned to the selective-prosecution issue, inquiring whether the parties would litigate it, the USMJ stated 'I will hear, at the conclusion of the case, any legal arguments anyone wishes to make; one of which I take it will be that in prosecuting Mr. Choi but not prosecuting these demonstrators [depicted in the photographs], the government is engaging in selective prosecution in violation of the Fifth Amendment.'").

[18] Just so it clear, the copy of the photographs that the Government states, see "Petition" at 11 fn 9, AUSA George received from Judge Facciola's law clerk, were in fact provided by the Defense to the clerk *for* delivery to AUSA Angela George. And Mr. Feldman appeared by phone during the conference because he resides in New York and was there at the time.

The Government thus had an initial five months and one week from March 18, 2011, to August 25, 2011, to do an investigation of selective prosecution and try to marshal a rebuttal. The Government had an additional four days from August 25, 2011, to August 28, 2011, to do so as well. Nor could the Government claim that even four days was insufficient, inasmuch as it developed its own case-in-chief in less than that amount of time. The Government did not bother finishing preparing its case-in-chief until Saturday, August 27, 2011—two days before trial—after it had made its last-ditch and unsuccessful plea offer to Lt. Choi on Friday, August 26, 2011 (as admitted by the Government, see "Petition" at 12). This last-minute preparation is demonstrated by the fact that AUSA George told the Defense that it could pick up Jencks and other discovery material from George's office at 1 p.m. on Saturday, August 27, 2011, and when a member of the Defense was present at George's office at that time, George's office told that member that it was still working on gathering material, and ultimately it did not turn over material until 2:30 p.m. This last-minute effort is also consistent with AUSA George's own statements at least to Defense Counsel and to the Magistrate, as early as the status hearing on June 14, 2011, that George was too busy to prepare for trial in this case. Yet, come trial, the Government—after only two days of preparation—was present with numerous witnesses, prepared lines of direct and cross examination, and even poster-boards with blown-up photographs. See 8/29-31/11 Trs., including Government Exhibit lists. Likewise, the Government could have in the four days after the August 25, 2011 phone-conference obtained witnesses and evidence in supposed rebuttal of a selective-prosecution defense.

The truth is not that the Government did not have an opportunity pretrial to prepare a supposed rebuttal of the selective-prosecution defense for trial, but that it deliberately failed to use that opportunity, because to do so would have been to gather evidence of its own persecution

of Lt. Choi, or to have to face a First/Fifth Amendment challenge in a misdemeanor case, *cf.* United States v. Meyer, 810 F.2d 1242, 1247, 258 U.S. App. D.C. 263 (D.C. Cir. 1987), *aff'd en banc sub nom.*, Bartlett v. Bowen, 824 F.2d 1240 (1987), *cert. denied sub nom.*, United States v. Meyer, 485 U.S. 940 (1988) ("Finally, we take into consideration the government's motivation to act vindictively in this case. *** But the prosecutor in this case confronted something other than routine invocations or procedural rights on the part of individual defendants. In this case, a large group of defendants threatened to go to trial on what the government considered 'petty offenses.' Many of these defendants had indicated their intention to proceed *pro se*. Many had determined to raise first amendment claims during the course of the trial. The government had a strong incentive to try to keep clear of this courtroom morass: it wished to avoid the annoyance and expense of prosecuting these minor cases at a potentially drawn-out trial. The Supreme Court previously had recognized that the government's interest in discouraging unexpected and burdensome assertions of legal rights may rise to a level that supports use of a presumption of vindictiveness.").

Indeed, Judge Facciola himself during trial—precisely when the Government complained about his decision to let Lt. Choi pursue a selective/vindictive-prosecution defense—pointedly commented on the Government's own pretrial lack of diligence regarding the selective-prosecution defense. See "Petition" at 18 (quoting The Honorable John M. Facciola, 8/31/11 Tr. at 6-7) ("During the August 25, 2011 phone conference the government "could have at that point asked me, because selective prosecution was raised, to continue the proceeding so that issue could be addressed. But we all went forward.").

The third reason why the Government cannot claim as a harm the lack of opportunity to "develop" a supposed rebuttal is that Judge Facciola—precisely after deciding to allow Lt. Choi

to pursue a selective/vindictive-prosecution defense—indisputably gave the Government another opportunity to do discovery on the selective (vindictive)-prosecution issue—indeed, the *same* opportunity as Lt. Choi to do discovery on the issue. See "Petition" at 18 (quoting The Honorable John M. Facciola, 8/31/11 Transcript at 2-3) ("I, therefore, will permit both sides to elicit evidence as to the difference in his treatment on those three occasions."); see, also, The Honorable John M. Facciola, 8/29/11 p.m. Tr. at p. 130 ("if he does raise a defense and you in fairness have not had a fair opportunity to speak to the factual issues presented, I will permit you to do so."). Indeed, the Government actually had/has an advantage over Lt. Choi in its new opportunity, because most of the evidence is already in the Government's peculiar possession and knowledge. For example, Lt. Choi did not know of the existence of the pre-protest communications between federal officials to charge him with a federal crime—*e.g.*, the Myers memo, the LaChance conversation, *etc.*—until after the Government witnesses had testified about them at trial. Critically, the Government never disclosed them in discovery to Lt. Choi.

Thus, the Government simply suffered no irreparable harm from Judge Facciola's decision, and mandamus is inappropriate.

3. No Clear and Indisputable Right to Relief

The Government has no clear and indisputable right to relief in this case. Mandamus will only issue "to compel the performance of a clear nondiscretionary duty." Pittston Coal Group v. Sebben, 488 U.S. 105, 121 (1988) (internal quotation marks omitted). "The requirement of a clear duty is inimical to a discretionary determination that is vested in the district court." In re DRC, Inc., 358 Fed.Appx. 193, 194 (D.C. Cir. 2009). "[W]here there is discretion . . . even though its conclusion be disputable, it is impregnable to mandamus." United States ex rel. Alaska Smokeless Coal Co. v. Lane, 250 U.S. 549, 555 (1919). And, again, "[e]ven though

hardship may result [from a lower court's discretionary decision], [in the absence of irreparable harm] extraordinary writs are not substitutes for appeal." United States v. Feeney, 641 F.2d 821, 825 (10th Cir. 1981). Judge Facciola had no clear nondiscretionary duty to preclude Lt. Choi from pursuing a selective/vindictive-prosecution defense at trial or mid-trial, especially after certain evidence of such defense was exposed *for the first time* at trial. At the very *least*, it was within Judge Facciola's discretion to allow Lt. Choi to pursue such a defense at trial or mid-trial. At the very most, Judge Facciola had a clear nondiscretionary *duty* to *allow* Lt. Choi to pursue such a defense at trial or mid-trial as a constitutional right.

Again, in United States v. Washington, 705 F.2d 489, 494-495, 227 U.S. App. D.C. 184 (D.C. Cir. 1983), the D.C. Circuit apparently approved of—as an exercise of discretion—exactly what Judge Facciola did in this case: allowing a criminal defendant to at trial or mid-trial pursue—after introduction of evidence tending to show selective (vindictive) prosecution—a selective (vindictive)-prosecution defense, including by obtaining immediate discovery—for use at the ongoing trial—of documents and testimony from the Government relevant to the defense.

Moreover, generally, a "magistrate . . . permissibl[y] exercise[s] . . . discretionary control over the mode and order of interrogating witnesses and presenting evidence" including during trial. United States v. Ferguson, 778 F.2d 1017, 1020 (4th Cir. 1985) (internal quotation marks omitted); see, also, FRE 611(a) ("The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, ..."). This magistrate discretion derives from the fact that the supervising "district court [itself] enjoys broad discretion regarding the manner in which a trial shall proceed." United States v. Ashton, 555 F.3d 1015, 1021, 384 U.S. App. D.C. 368 (D.C. Cir. 2009).

Because a magistrate judge thus has discretion over a case including its trial, a magistrate judge may do anything during the case including at trial which is not otherwise prohibited by law or jurisprudence. There is no legal or jurisprudential prohibition on allowing a criminal defendant to pursue a selective/vindictive-prosecution defense, or even allowing a criminal defendant to do so at trial or mid-trial. Indeed, just the opposite. Selective/vindictive-prosecution[19] is a long-recognized criminal defense. See Shuttlesworth v. Alabama, 394 U.S. 147 (1969) (conviction reversed where government singled out Black civil-rights protestors because of their race and their speech condemning government and private discrimination); United States v. Armstrong, 517 U.S. 456, 463 (1996) ("[a] selective prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution"); Thigpen v. Roberts, 468 U.S. 27 (1984) (reversal of conviction on heightened charges brought due to prosecutorial vindictiveness against defendant for exercising right to appeal lesser charges); Blackledge v. Perry, 417 U.S. 21 (1974) (to same effect); United States v. Meyer, 810 F.2d 1242, 258 U.S. App. D.C. 263 (D.C. Cir. 1987), *aff'd en banc sub nom.*, Bartlett v. Bowen, 824 F.2d 1240 (1987), *cert. denied sub nom.*, United States v. Meyer, 485 U.S. 940 (1988) (charges dismissed against White House protestors because prosecutor had upped the charges against the protestors because they chose to go to trial); see, also Oyler v. Boles, 368 U.S. 448, 456 (1962).

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[19] *Cf.* United States v. Wilson, 639 F.2d 500, 502 (9th Cir. 1981) ("Little substantive difference can be detected between selective prosecution and vindictive prosecution. Vindictive prosecution arises only where the government increases the severity of alleged charges in response to a defendant's exercise of constitutional rights. Selective prosecution challenges arise when a defendant alleges that he is being prosecuted initially for having exercised a constitutional right. The interests involved are the same as in vindictive prosecution cases: the defendant seeks protection from criminal prosecution initiated punitively, in response to the exercise of his constitutional rights.") (citations omitted).

Selective/vindictive prosecution is also a defense that may be raised at any time. *Cf. supra*. The Federal Rules of Criminal Procedure explicitly prescribe only three defenses that must be noticed pretrial: the defense of alibi, see FRCrP 12.1; the defense of insanity, see FRCrP 12.2; and the defense of public authority, see FRCrP 12.3. No other defense—including selective/vindictive prosecution—is listed.

Even under FRCrP 12, a selective/vindictive-prosecution defense may be raised any time. FRCrP 12(b)(2) states: "Motions That May Be Made Before Trial. A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue." FRCrP 12(b)(3) states: "Motions That Must Be Made Before Trial. The following must be raised before trial: (A) a motion alleging a defect in instituting the prosecution; (B) a motion alleging a defect in the indictment or information–but at any time while the case is pending, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction or to state an offense; (C) a motion to suppress evidence; (D) a Rule 14 motion to sever charges or defendants; and (E) a Rule 16 motion for discovery." FRCrP 12(e) states: "Waiver of a Defense, Objection, or Request. A party waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c) or by any extension the court provides. For good cause, the court may grant relief from the waiver."

The intent to pursue a selective/vindictive-prosecution defense is not expressly mentioned in FRCrP 12(b). Using the canons of statutory construction then, the intent to pursue a selective/vindictive-prosecution defense *arguably* falls under FRCrP 12(b)(2), because, as "[a] selective prosecution claim is not a defense on the merits to the criminal charge itself," United States v. Armstrong, *supra*, it is a "defense . . . that the court can determine without a trial of the

general issue." Thus, a criminal defendant *may* raise the defense before trial, but if the defendant does not, the defendant does not waive the right to raise the defense at trial.

That a selective/vindictive-prosecution defense falls under permissive FRCrP 12(b)(2) and not mandatory FRCrP 12(b)(3)—if FRCrP 12 is applicable at all—is bolstered by two things. First, the word "defense" is only mentioned in FRCrP 12(b)(2); FRCrP 12(b)(3) talks only about "motions." Selective/vindictive prosecution is a defense—not a motion. Therefore, it belongs under FRCrP 12(b)(2), *if at all.*

Second, it is well-established that to pursue a selective/vindictive-prosecution defense a criminal defendant "must first make a preliminary or threshold showing of the essential elements of the selective prosecution defense." United States v. Jacob, 781 F.2d 643, 646 (8th Cir. 1986). "[E]ven to initiate discovery to prove impermissible motives a defendant must make a colorable showing [of selective (vindictive)-prosecution]." United States v. Washington, 705 F.2d 489, 493, 227 U.S. App. D.C. 184 (D.C. Cir. 1983). "[A] mere allegation of selective prosecution . . . does not require the government to disclose the contents of its files." United States v. Catlett, 584 F.2d 864, 865 (8th Cir. 1978). "[T]he defendant must produce some evidence tending to show the existence of the essential elements of the defense and that the documents in the government's possession would indeed be probative of these elements." *Ibid.* An evidentiary hearing on the issue will only be granted if the "defendant presents facts sufficient to raise a reasonable doubt about the prosecutor's motive." Jones v. White, 992 F.2d 1548, 1572 (11th Cir. 1993).

Thus, the timing of the raising of a selective/vindictive-prosecution defense is determined not by what stage the criminal case is in—pretrial versus trial—but by when the defendant diligently obtains sufficient evidence of the defense to trigger a hearing—whether that be pretrial or at trial. Thus, a rule *requiring* a criminal defendant to raise a selective/vindictive-

prosecution defense pretrial or lose forever it would make no sense, because evidence or sufficient evidence of selective/vindictive prosecution if it comes out at all may not or usually does not come out until at trial—primarily because it is within the Government's peculiar knowledge and possession and the Government self-servingly withholds it (as outrageously happened in Lt. Choi's case). Such a rule would perversely punish a criminal *defendant* because of the *Government's* wrongful obfuscation of its own wrongdoing in the first place. And it must be emphasized that simply because a defendant thinks or believes s/he has a selective/vindictive-prosecution defense, or raises it as an issue pretrial, does not mean that s/he is entitled to discovery on that defense, or that s/he has sufficient evidence to make out or to know to make out a *prima facie* case of that defense.

Additionally, a selective/vindictive-prosecution defense is a profoundly "factual" defense: who did what to whom (and/or not to whom) and why. "[D]efenses, such as self-defense, insanity, and entrapment, [that] require factual determinations that the [trier of fact] should make, render[] pretrial disposition inappropriate." United States v. Smith, 866 F.2d 1092, 1097 fn 5 (9th Cir. 1989). "In these cases, the question is not whether the defense *must* be raised prior to trial, but whether it *may* be raised prior to trial." *Ibid.* (emphasis original).

Furthermore, even if raising a selective/vindictive-prosecution defense fell under FRCrP 12(b)(3), *cf.* United States v. Jones, 52 F.3d 924 (11th Cir. 1995); United States v. Gary, 74 F.3d 304 (1st Cir. 1996)—which, importantly, the D.C. Circuit has never held and is contrary to the D.C. Circuit's own Washington case—such a defense could still be raised at trial without having previously been raised pretrial, under three established approaches. First, FRCrP 12(b)(3) itself contains no enforcement mechanism; rather, it relies on FRCrP 12(e) for a rule of waiver. But FRCrP 12(e) critically states that a "party waives any Rule 12(b)(3) defense, objection, or

request not raised *by the deadline* the *court sets* under Rule 12(c) or by an extension the court provides." (Emphasis added.) Thus, if a judge does not set a deadline—which it is in a judge's *discretion* to do or not to do to begin with, see *supra*—there simply then is no waiver if a defendant waits until trial to raise a FRCrP 12(b)(3) defense such as (arguably) selective/vindictive prosecution.

Moreover, as the Notes of Advisory Committee on Rules make clear, FRCrP 12 "leaves with the court *discretion* to determine in advance of trial defenses and objections raised by motion or to *defer* them for *determination at the trial*." Notes of Advisory Committee on Rules—1944, Note to Subdivision (b)(4) (emphasis added); see, also, Notes of Advisory Committee on Rules, House Report No. 94-247; 1975 Amendment ("Subdivision (e) as proposed to be amended permits the court to *defer* ruling on a pretrial motion until the *trial* of the general issue or until after verdict.") (emphasis added). Thus, even when a criminal defendant does raise pretrial a selective/vindictive prosecution as an issue of defense, a judge may defer resolution of it until trial.

Second, normally waiver in criminal procedure means an intentional relinquishment of a known right. See Johnson v. Zerbst, 304 U.S. 458, 464 (1938). FRCrP 12(e) thus is only effective to begin with if a criminal defendant knew or should have known before trial (or, rather, before the FRCrP 12(e) deadline) of a particular defense, including selective/vindictive prosecution, to raise that particular defense. Obviously, if a defendant reasonably does not know s/he has a defense, s/he cannot raise it. Since, as discussed above, a selective/vindictive-prosecution defense has a heightened evidence requirement to begin with to overcome the presumption of prosecutorial regularity, knowledge of such a defense—or rather of a *prima facie* case of such a defense—may not arise for a criminal defendant until trial. Therefore, in such a

situation, there is *no* waiver, and the defense obviously may be asserted at trial. See, *e.g.*, United States v. Jones, 52 F.3d 924, 925 (11th Cir. 1995) (court allowed selective-prosecution defense to be raised as late as on appeal after the Government disclosed transcripts during trial that first revealed a basis for raising a selective-prosecution defense).

Third, on its face, FRCrP 12(e) has a *grace* provision allowing a criminal defendant to raise a selective/vindictive-prosecution defense for the first time at trial. "For good cause, the court may grant relief from the waiver." FRCrP 12(e). Whether "good cause" exists is a question which squarely "lies within the discretion of the trial court." Keegel v. Key West & Caribbean Trading Co., Inc., 627 F.2d 372, 373 (D.C. Cir. 1980). Thus, if a judge finds that there was good reason why a criminal defendant did not raise a selective/vindictive-prosecution defense pretrial—such as that the Government denied the defendant evidence of such a defense despite the defendant's diligence, or that the defendant reasonably did not know of the evidence, or that there was some unreasonable hardship to pursuing the defense at the time—the judge may allow the defendant to raise the defense later anyway. See United States v. Jones, 52 F.3d at 926 fn 2 (court *sua sponte* allowed selective-prosecution defense even though not raised pretrial because defendant's counsel could not have raised it pretrial due to his ethical conflict).

Finally, the law and jurisprudence not only do not *prohibit* a magistrate judge from allowing a diligent defendant a selective/vindictive-prosecution defense at trial or mid-trial as just demonstrated, they *require* a judge to as a constitutional matter. A criminal defendant has a Sixth Amendment constitutional right to "present a complete defense," Crane v. Kentucky, 476 U.S. 683, 690 (1986), and is entitled to a "fair opportunity to defend against the [government's] accusations." Chambers v. Mississippi, 410 U.S. 284, 294 (1973).

Thus, under all of the authorities above, a magistrate judge has discretion—if not absolute discretion—to allow a selective/vindictive-prosecution defense to be pursued at trial or mid-trial. Thus, Judge Facciola's discretionary decision to allow Lt. Choi to pursue a selective/vindictive-prosecution defense at trial or mid-trial—after Judge Facciola had clearly deferred the issue of selective-prosecution until trial as the Government itself admits[20]—is not subject to or addressable by mandamus.

Even if Judge Facciola abused his discretion in arriving at that decision—which, as will be demonstrated momentarily, was clearly not the case—that decision still is not susceptible to mandamus in the absence, as demonstrated above, of irreparable harm to the Government. See Nat'l Ass'n of Criminal Defense Lawyers, Inc. v. United States Dep't of Justice, 182 F.3d 981, 987 (D.C. Cir. 1999); In re Cooper Tire & Rubber Co., 568 F.3d 1180 (10th Cir. 2009) ("There must be more than what we would typically consider to be an abuse of discretion in order for the writ to issue.").

The Government boldly cites three cases, U.S. v. Washington, 705 F.2d 489 (D.C. Cir. 1983), U.S. v. Jarrett, 447 F.3d 520 (7th Cir. 1996), and United v. Lopez, 854 F.Supp. 57 (D.P.R. 1994), for the proposition that once the jury has been seated or the first witness has been sworn in a criminal case, selective/vindictive prosecution may not so much as be whispered of by anyone including the judge. However, these cases stand for no such proposition. Indeed, they

[20] See "Petition" at 12 (partially quoting 8/25/11 Transcript at 7, 10-11) ("The prosecutor then noted that, pursuant to Rule 12(b)(3)(A) of the Federal Rules of Criminal Procedure, to pursue a claim of selective prosecution , the defense was required to file a pretrial motion (id. at 7). The USMJ responded, '. . . your objection will be reserved, and . . . I will consider it when I try the case' (id. at 7). Later, during the status hearing, when the government returned to the selective-prosecution issue, inquiring whether the parties would litigate it, the USMJ stated: 'I will hear, at the conclusion of the case, any legal arguments anyone wishes to make; one of which I take it will be that in prosecuting Mr. Choi but not prosecuting these demonstrators, the government is engaging in selective prosecution in violation of the Fifth Amendment' (id. at 10-11)."); see, also, 8/31/11 Tr. at 5-6.

do not even address the obviously good-cause situation where a defendant reasonably learns of selective/vindictive prosecution or of a *prima facie* case of same for the first time *at trial*. In each of the Government's cases, the respective court merely ruled that the defendant had not made out a *prima facie* case of selective prosecution on the merits, not that such a case was procedurally precluded altogether.

Thus, the Government has no clear and indisputable right to relief, and mandamus is inappropriate.

4. No Abuse of Discretion

As discussed above, under the ordinary rules of mandamus analysis, the propriety itself of Judge Facciola's discretionary decision need not even be discussed, for the Government's "petition" to be squarely rejected. The fact that it was Judge Facciola's *discretion* to make the decision in the first place is immediately dispositive against mandamus in the absence of irreparable harm. Nevertheless, out of fairness to Judge Facciola, Lt. Choi, and the principles at stake in this case, a brief[21] discussion of the propriety of Judge Facciola's decision will be undertaken without waiver of any previous argument.

It is abundantly clear that what happened in this case was a *paradigmatic* exercise of judicial discretion. While existential-democratic principles (such as freedom to criticize the Government for discrimination) were/are certainly at stake in this criminal case, the fact remains that it was/is still a federal *misdemeanor* case. Lt. Choi was charged with disobeying a lawful order of a Park Police officer, see 36 CFR § 2.32(a)(2), which carries a prison term of 6 months or less and/or a fine, see 36 CFR § 1.3(a). Given that it was/is a misdemeanor case, Judge

[21] Since this matter is not on appeal by the Government to this Court, a full explication of the evidence making out a *prima facie* case of selective/vindictive prosecution need not and will not be gone into. Again, the Government's "petition" is not an appeal and may not be treated as such.

Facciola had a legitimate interest in streamlining the progress of the case as much as possible—for judicial sake as well as that of the parties.

Thus, after when, in pretrial discussions with both the Government and the Defense, *Judge Facciola* himself could not help but notice the conspicuously unusual federal charge brought by the Government against Lt. Choi,[22] and Defense Counsel themselves raised the selective-prosecution defense as an issue, Judge Facciola obviously made the completely understandable, logical, and permissible decision to *defer* the issue of such a defense until *after* presentation of the evidence at trial—so that there would be only one evidence-hearing (the trial) instead of two (a pretrial-evidentiary-hearing and the trial). This was particularly fair and efficient given that Lt. Choi is paying out of pocket for his own defense; he resides in New York, as does three of his Defense Counsel of record; one of his Defense Counsel of record resides in Florida; his one Defense witness lives in Ohio; and the majority of the Government/Defense-hostile witnesses are in federal law-enforcement and subject to duty rotations.

Consequently, and critically, Judge Facciola did *not* set a deadline for FRCrP 12(b)(3) motions in the case—deliberately deferring the issue of selective prosecution until trial, as shown above. Again, this was eminently fair and efficient of Judge Facciola, as it allowed for the possibility of the issue being efficiently *naturally disposed of*—including in the *Government's* favor should the evidence at trial fail to adduce a *prima facie* case of selective prosecution. In fact, Judge Facciola's decision was *more than* fair to the Government. Contrary to the Government's assertion that Judge Facciola erred by not ruling at the beginning of trial on its motion in limine, see "Petition" at 4, 25, Judge Facciola had *no* duty to even entertain the Government's motion or later trial-objection to the defense at all, as it was thoroughly

[22] Again, to the point of comparing it to Shuttlesworth v. Alabama.

untimely—in fact *waived* by being so untimely. The Government filed the motion literally at the eleventh hour (approximately 11:30 p.m.) on the day before trial—a Sunday. Lead defense counsel, Robert J. Feldman, who by then was in D.C., did not even see a copy of the motion until trial when AUSA George handed it to him in the courtroom right before bringing it up with Judge Facciola. Judge Facciola himself—who presumably was not working on Sunday even if the parties were—was only able to peruse the motion early Monday morning before the 9:30 a.m. trial. See 8/29/11 a.m. Tr. at 4. Judge Facciola thus properly deferred ruling on the motion until after the evidence was presented.

Once the first witness was sworn, it was then simply a matter of the evidence naturally taking the case wherever it went. And the evidence took the case squarely and inexorably to a selective/vindictive-prosecution defense—and it did not even wait until the Defense case-in-chief to do so. The Government's own witnesses and evidence during its case-in-chief provided some of the most damning evidence against the Government of selective *and* vindictive prosecution. U.S. Park Police Lieutenant Robert LaChance, the November 15, 2010 incident commander and the officer who ordered Lt. Choi's arrest, admitted on cross-examination that before November 15, 2010—the day of Lt. Choi's protest—the Park Police and the Secret Service knew the protest was going to take place—even though Lt. Choi and his fellow protestors had not made that public. Lt. LaChance had had a discussion with his supervisors in the Park Police (including U.S. Park Police Captain Philip Beck, the Park Police watch commander on November 15, 2010) and other law-enforcement agency personnel about the planned protest. See Lt. Chance, 8/29/11 a.m. Tr. at pp. 48-53, 8/29/11 p.m. Tr. at pp. 15-17. Lt. LaChance testified that prior to November 15, 2010, he had received an email from the Secret Service about the protest. See 8/29/11 a.m. Tr. at p. 49. Lt. LaChance also testified that several hours before the protest on

November 15, 2010, he was forwarded an email from U.S. Park Police Detective Sergeant Timothy Hodge attaching a memo from Randolph J. Myers of the Solicitor's Office of the Department of Treasury (the Department for the Park Police agency). See 8/29/11 p.m. Tr. at pp. 24-26; Govt. Exs. 24/25. The memorandum, addressed to Det. Sgt. Hodge, among others, concerned how to charge Lt. Choi federally for the planned protest. See *ibid.*

U.S. Park Police Sergeant Michael Fermaint, who assisted in the arrest of Lt. Choi on November 15, 2010, testified that he too had prior knowledge of the protest. See Sgt. Michael Fermaint, 8/29/11 p.m. Tr. at p. 84. As did U.S. Park Police Officer Cameron Easter. See Off. Easter, 8/29/11 a.m. Tr. at p. 12.

Despite what Lt. LaChance just testified to, Lt. LaChance's superior on November 15, 2010, U.S. Park Police Captain Philip Beck, incredibly and tellingly could "not recall" whether prior to the protest on November 15, 2010, he had knowledge of the protest, or had talked to Lt. LaChance or Det. Sgt. Hodge about the protest. See Cpt. Beck, 8/31/11 a.m. Tr. at pp. 30-31. Cpt. Beck did know both Det. Sgt Hodge and Randolph Myers at the time though. See *ibid*; *id.* at p. 39. Cpt. Beck also testified that it was not standard to receive communications from the Secret Service regarding protests. See *ibid.* Cpt. Beck also testified that, in contrast to the federal charge for Lt. Choi's November 15, 2010 arrest, the Government had charged Lt. Choi municipally with failure to obey for his March 18, 2010 and April 20, 2010 arrests, and that those two municipal charges had been dismissed before November 15, 2010. See *id.* at pp. 15, 21, 37-38, 61-64. Cpt. Beck also testified that, before the November 15, 2010 protest, he consulted in person someone in the D.C. Attorney General's Office—who had final legal opinion on the status of the White House sidewalk as a D.C. street sidewalk—on whether the White House fence masonry-base was part of the White House sidewalk, and the particular Assistant

Attorney General opined it was not so part of the sidewalk. See *id.* at pp. 26-28. Again, incredibly, and tellingly, Cpt. Beck could not remember the name of the D.C. Assistant Attorney General he spoke with. See *ibid.*

Despite that D.C. A.G. opinion, and despite AUSA George asserting the same opinion on behalf of the U.S. Government to Judge Facciola, see *supra*, Cpt. Beck testified that "in my belief, [Lt. Choi] was on the White House sidewalk" by being on the White House fence masonry-base. See Cpt. Beck, 8/31/11 a.m. Tr. at p. 26. Cpt. Beck also testified that he believes "Gay" is slanderous. See *id.* at 40.

U.S. Park Police Officer Jerome Stoudamire, who was also present at Lt. Choi's arrest on November 15, 2010, testified that in his experience of 22 years and 2,000 arrests including in front of the White House, he "would have to say this [Lt. Choi's case] is the first time" he has seen a federal charge of failure to obey. See Off. Stoudamire, 8/29/11 p.m. Tr. at p. 135. This is consistent with Lt. LaChance's testimony that Lt. LaChance knew of only two other cases where someone affixed themselves to the White House fence—one by bike u-lock and one by leather belt—and both of those cases were charged municipally as failure to obey. See Lt. LaChance, 8/29/11 p.m. Tr. at pp. 62-66.

U.S. Park Service Ranger Amy Dailey, who helps with the issuance of permits for those who need them under the regulations (*i.e.*, groups of more than 25 people), testified that she was present during Lt. Choi's November 15, 2010 protest. See Ranger Dailey, 8/29/11 a.m. Tr. at p. 30. She had come to the area to check on the status of a group of 50 hunger strikers permitted for in *Lafayette Park*. See *id.* at 32. A woman with that group was talking about "Jesus" while Lt. Choi's DADT protest was going on. See 8/29/11 a.m. Tr. at p. 100; Govt. Ex. # 2. However, while talking, this "Jesus" lady was on Pennsylvania Avenue in line with the White House—not

in Lafayette Park—and she was using an amplified electronic-bullhorn, somewhat even drowning out Lt. Choi and his fellow protestors. See *ibid.* Even though Ranger Dailey testified that the hunger-strike group was not permitted for an amplified electronic-bullhorn, see Ranger Dailey, 8/29/11 a.m. Tr. at p. 35 lines 13-15, the Park Police neither ordered the "Jesus" lady to stop speaking or to stop using the amplifier or to move from Pennsylvania Avenue, nor arrested her, see Govt. Ex. # 2. However, the Park Police did arrest Lt. Choi and his fellow protestors—even though the regulations did not apply to them (because they were a group of less than 25 and were not on the sidewalk), see AUSA George, 8/29/11 a.m. Tr. at p. 108 lines 20-23.

Moreover, incredibly, and tellingly, Ranger Dailey testified that the only voices she recalled hearing during Lt. Choi's protest were those of Park Police officers giving the orders to Lt. Choi and his fellow protestors. See Ranger Dailey, 8/29/11 a.m. Tr. at p. 37.

All of the Government witnesses testified that Lt. Choi and his fellow protestors were peaceful and not disorderly during the November 15, 2010 protest. See Cpt. Beck, 8/31/11 a.m. Tr. at pp. 16-18, 35; Lt. LaChance, 8/29/11 p.m. Tr. at pp. 41-42, 52; Off. Stoudamire, 8/29/11 p.m. Tr. at 118. AUSA George confirmed this fact. See AUSA George, 3/18/11 Tr. at p. 23 (Lt. Choi and fellow protestors not disorderly).

Defense witness Captain James E. Pietrangelo, II—who was part of the November 15, 2010 protest but did not chain himself to the White House on that occasion[23] as did Lt. Choi and the twelve other activists arrested—testified that there was an individual in plain-cloths waiting for him, and his group of some of the 12 who later chained themselves to the White House fence with Lt. Choi, on their way to the White House for the planned protest after they emerged from a Metro stop 6 to 10 blocks from the White House. See Cpt. Pietrangelo, 8/30/11 a.m. Tr. at pp.

[23] He had done so on two prior occasions, though, with Lt. Choi.

26-27, 29. Cpt. Pietrangelo testified that the individual looked strangely at his group and seemed to recognize Cpt. Pietrangelo, and then spoke into her cuff: "There is a bunch of them coming to the White House." See *id.*

Cpt. Pietrangelo also testified that Lt. Choi was the leader of the three DADT protests in front of the White House, and that his and Lt. Choi's intent, policy, and practice in the protests was to engage in speech protesting DADT while remaining non-violent and lawful. See *id.* at pp. 18-26, 34, 51, 73-97. Cpt. Pietrangelo testified that he and Lt. Choi made everyone involved in the protests sign written pledges of non-violence, and additionally verbally emphasized that principle to them. See *id.* at pp. 21-26. Cpt. Pietrangelo testified that he and Lt. Choi chose the White House fence masonry-base to stand on during the protests because it was a lawful "loophole"—not part of the sidewalk which was subject to the regulations. See *id.* at pp. 74-83. Cpt. Pietrangelo testified that they used handcuffs as lawful props to symbolize the second-class citizenship of Gays. See *id.* at p. 88. Cpt. Pietrangelo testified that they would have ended their protest—had they not been arrested—once they decided they had finished engaging in the desired message. See *id.* at p. 53. Cpt. Pietrangelo testified that he was part of all three protests and that the first two were different from the last in that the Government charged the first two municipally, and that the first two were stoic but that the third spoke directly to President Obama. See *id.* at pp. 13, 20, 23, 35, 44, 75, 86, 88. Cpt. Pietrangelo testified that Lt. Choi was like MLK, Jr. in inspiring the third protest with his gravitas and courage after the first two arrests. See *id.* at p. 88. Cpt. Pietrangelo also testified that while in D.C. jail after being arrested by the Park Police and charged municipally for chaining himself in March and April 2010 with Lt. Choi, he, Lt. Choi, and other DADT-protest arrestees experienced harassment from the police. See *id.* at p. 23. Cpt. Pietrangelo testified that while in jail he witnessed the police

denying medical attention to an HIV+ fellow DADT-protest arrestee apparently having a heart attack. See *id.* at p. 23.

Lt. Choi himself also testified to the same peaceful and lawful intent of the protests. See Lt. Choi, 8/30/11 p.m. Tr. at pp. 57, 75, 77, 83. Indeed, he cited Jesus, Alice Paul, Ghandi, and King. See *id.* at pp. 57, 93. Lt. Choi testified that while he was in custody after his first arrest on March 18, 2010, U.S. Park Police Detective Sergeant Timothy Hodge ceremoniously ripped the insignia and American Flag off of Lt. Choi's uniform, see *id.* at pp. 64-65, and told Lt. Choi that Hodge had been in the Marines and knew what Lt. Choi and Cpt. Pietrangelo were not supposed to do, see *ibid.* Lt. Choi testified that during the April 20, 2010-protest arrest, Det. Sgt. Hodge was present and in command of the arresting Park Police officers. See *ibid.* Lt. Choi testified that during the November 15, 2010 arrest of the DADT protestors, Det. Sgt. Hodge was again present, deliberately made eye contact with Lt. Choi, and stood right in front of Lt. Choi when he was standing on the White House fence masonry-base. See *ibid.* Lt. Choi also testified that during the November 15, 2010 arrest of the DADT protestors, Det. Sgt. Hodge ceremoniously took the rank off of another Gay military veteran, Rob Smith.

During Lt. Choi's testimony at trial, a Park Police report concerning Lt. Choi's March 18, 2010 arrest was marked for identification as Defense Exhibit C. In that report, Det. Sgt. Hodge indicated that after Lt. Choi was arrested, Det. Sgt. Hodge called the Military on Lt. Choi—even though Lt. Choi—a New York National Guard soldier—was clearly not "in status" at the time of his protest/arrest and had broken no law and thus was not subject to Military jurisdiction.[24]

[24] Including as to the wearing of the uniform during the protest. 10 U.S.C. § 772 permits the wearing of the uniform during theatrical productions, and the Supreme Court has held that theatrical productions include street theater, which undeniably would include dramatic protests. See Schacht v. United States, 398 U.S. 58 (1970). In Schacht, the Supreme Court also struck down the prohibition on civilian wearing of the uniform if it brings discredit upon the Military.

Lt. Choi also testified as to how his protests were meant to build momentum like the Greensboro sit-ins, how the two previous arrests had been charged municipally and then dropped, and how the third protest was uniquely strident in speech and directed at President Obama. See Lt. Choi, 8/30/11 p.m. Tr. at pp. 49, 63, 76-77, 87, 93.

During Lt. Choi's testimony, Defense Exhibit B—a video from the Washington Blade (a Gay-issues news site)—was played. Like Government Exhibit # 2 which was also played at trial, Defense Exhibit B showed Lt. Choi's November 15, 2010 arrest, but from a different angle. Both Government Exhibit # 2 and Defense Exhibit B showed the Park Police, in arresting Lt. Choi, uniquely swarming him from among the 13 DADT-protestors arrested. Det. Sgt. Hodge can be seen violently manipulating Lt. Choi's body. At one point U.S. Park Police Officer Laska can be seen pounding Lt. Choi to the pavement, and putting his knee into below Lt. Choi's buttock. One Park Police officer can be seen sickeningly bending Lt. Choi's left arm up against the elbow joint. At another point, Det. Sgt. Hodge can be seen patting Lt. Choi's head like a dog. Lt. Choi testified as to these things as well. See Lt. Choi, 8/30/11 p.m. Tr. at pp. 83, 89-90. In particular, Lt. Choi testified that the Park Police's unnatural bending of his arm left him with post-arrest paralysis in his index finger. See *id.* at p. 60. Lt. Choi also testified that Off. Laska later bragged about throwing Lt. Choi to the ground. See *id.* at 90.

Even the Government prosecutor, AUSA Angela George, "testified" by her behavior at trial to the Government's animus and vindictiveness towards Lt. Choi and his fellow Gay activists. In an outrageous and disgusting display of that animus and vindictiveness, AUSA George at one point suggested that because Lt. Choi is Gay, he had to have derived pleasure from having male Off. Laska's knee driven into below his buttock: MS. GEORGE: So it was Officer Laska putting his body parts on your body parts, correct? LT CHOI: It seems very clear,

yes. MS. GEORGE: And you said that you had some sensations when that was going on, correct? LT. CHOI: To be honest, I think—yes. MS. GEORGE: Okay. Thank you. See *id.* at 90.

AUSA George also made a point of refusing to address Lt. Choi and Cpt. Pietrangelo by their preferred former military ranks, see *id.* at p. 70, even after the Court had instructed her to do so out of courtesy, see *id.* at p. 24.

Finally, Lt. Choi testified that after he and the 12 other November 15, 2010 DADT-protestors were federally charged, AUSA George offered them a "wired" plea deal. See *id.* at 86. As discussed *infra*, that "wired" plea deal required all of the defendants to plead guilty for any of them to do so.

Government Exhibit # 2 also showed the Park Police during the November 15, 2010-protest arrest twice unnecessarily zooming the police camera in on the face of Father Geoff Farrow, a Gay priest who was in priest frock and collar and handcuffed to the fence like Lt. Choi. The zooming-in clearly caused Father Farrow anguish.

Finally, the photographs of the Osama bin Laden-death rally of which Judge Facciola took judicial notice pretrial showed "partying" revelers plastered the *entire* length of the White House fence on Pennsylvania Avenue with their pressing, stationary bodies, and a stationary crowd fully occupying Pennsylvania Avenue, including the White House sidewalk. Revelers climbed up on the White House fence pedestal and some hung off of the fence. Others raised banners and signs in front of the fence. That's not to mention the revelers who—creating public danger and disorder—climbed up and hung off a lamp post on the White House sidewalk or climbed up and hung in at least three trees on the White House sidewalk, or the revelers who (as evidence besides the photographs would show) fast-downed beers or flashed their breasts, to name a few things. The photographs also showed a protestor with an Obama campaign sign, and

another protestor with a cardboard figure of President Obama smiling. Another judicially-noticed photo showed a Park Police officer smiling at the crowd during the rally.

Lt. LaChance testified that he was not aware of any arrests by the Park Police as a result of the Osama bin Laden-death rally. See Lt. LaChance, 8/29/11 p.m. at p. 31.

Finally, Defendant's Exhibit D at trial was a copy of U.S. Attorney General Michael Mukasey's December 19, 2007 memorandum requiring high-level White House coordination if the White House and DOJ or any sub-component discuss an ongoing criminal matter or investigation, such as vis-à-vis Lt. Choi's planned protest.

All of this evidence made out a *prima facie* case of selective *and* vindictive prosecution, and, again, the Defense was not even close to finishing presenting its case. The cumulative evidence to that point showed—as Judge Facciola ultimately stated, see The Honorable John M. Facciola, 8/31/11 p.m. Tr at pp. 5, 6, 19—that the Government charged Lt. Choi municipally the first two arrests and federally the third, and that was arbitrary, discriminatory, and retaliatory. After two *successful* protests by Lt. Choi in front of the White House criticizing President Obama and the Government for discrimination, the Government had simply become offended by Lt. Choi's increasingly-effective criticism and had decided to single him out and silence him by prosecuting him on a federal charge, whereas before it had prosecuted him on municipal charges, and whereas it municipally charged others not likewise effectively protesting anti-Gay discrimination and did not arrest much less even charge those *praising* President Obama while violating the law or regulations pertaining to the White House. See United States v. Mangieri, 694 F.2d 1270, 1273 (D.C. Cir.1982) ("To establish such a claim [of selective prosecution], [the defendant] had to prove that (1) she was singled out for prosecution from among others similarly

situated and (2) that her prosecution was improperly motivated, i.e., based on race, religion or another arbitrary classification.").

Since Judge Facciola had *not set* a deadline for pretrial motions specifically so as to defer to trial the selective-prosecution-defense issue that Lt. Choi had raised as early as March 18, 2011, Lt. Choi had not waived that defense, and was then able, having thus made out a *prima facie* case of selective/vindictive prosecution by the end of merely his opening Defense case-in-chief, to ask Judge Facciola to let him obtain immediate discovery from the Government on the issue, which Lt. Choi did in his motion to compel and orally. See 8/31/11 a.m. Tr. at pp. 3-8 (Defense Counsel Norman Kent: "But during the course of the trial and the direct testimony of certain witnesses, evidence has been elicited that suggests, in fact, the government may have a case where selective prosecution can be made by the defense."). And Judge Facciola—especially as the determiner of credibility of the witnesses and evidence—was then within his discretion to grant that discovery.

In fact, Lt. Choi had a right to request, and Judge Facciola had the discretion if not duty to grant, selective/vindictive-prosecution discovery at that point even if Lt. Choi had not raised the selective/vindictive-prosecution-defense issue pretrial and Judge Facciola had not deferred the issue to trial, on the separate grounds that certain evidence of which Lt. Choi reasonably could not have known prior to trial came out at trial and provided the basis for a *prima facie* showing. The new evidence was the Government's own admissions discussed above that it secretly knew about Lt. Choi's protest days ahead of time, indicating illegal surveillance of a peaceful and lawful Gay-civil-rights group[25]; that the Government had specifically decided to

[25] This is especially true given the military nature of the protest. The Government's own Department of Defense had previously been caught illegally spying on peaceful Gay protest groups. See Lisa Myers, "Is the Pentagon spying on Americans?", NBC News, 12/15/05,

charge Lt. Choi with a federal crime ahead of time; that at least two different Government agencies—the Park Police and the Secret Service if not the Pentagon—had participated in that decision, meaning that the White House had to be involved as a matter of United States Attorney General policy; that the Government knew before and after it arrested Lt. Choi for failing to obey an order to leave the White House sidewalk that the White House fence pedestal on which Lt. Choi was arrested is not the sidewalk; and that Cpt. Beck—one of the Park Police officers involved in Lt. Choi's arrest and the decision to charge him—is prejudiced against Gays.[26]

Prior to this evidence coming out, Lt. Choi was simply not entitled to a hearing on the selective/vindictive-prosecution defense and thus could not have asked for discovery. See Jarrett v. United States, 822 F.2d 1438 (7th Cir. 1987) ("We know of no case law nor have we been furnished with any by Jarrett holding that a defendant is automatically entitled to a hearing on a claim of selective prosecution. To obtain an evidentiary hearing on the issue of selective

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available at http://www.msnbc.msn.com/id/10454316/print/1/displaymode/1098/; "Pentagon admits errors in spying on protestors," NBC News, 3/10/06, available at http://www.msnbc.msn.com/id/11751418/ns/us_news/t/pentagon-admits-errors-spying-protesters/. It was also recently disclosed that a retired male U.S. servicemember had been posing as a lesbian on the website "Lez Get Real" and criticizing Lt. Choi for his White House protesting. See Elizabeth Flock, " 'Paula Brooks,' editor of 'Lez Get Real,' also a man," washingtonpost.com, 6/13/11, available at http://www.washingtonpost.com/blogs/blogpost/post/paula-brooks-editor-of-lez-get-real-also-a-man/2011/06/13/AGld2ZTH_blog.html; lezgetreal.com, "Is Dan Choi Helping," 4/6/10, available at http://lezgetreal.com/2010/04/is-dan-choi-helping/ ("Gay veterans are furious with Dan Choi. Dan's most recent actions, handcuffing himself to the White House fence while in his ACUs (uniform), violate several military traditions, most importantly: You don't make political statements in uniform. And you don't break the law. That alone is enough for many military folks to be outraged. On top of that, most military people share a general distaste for public protest and distrust of the media. There is a general sense that, as a Soldier, you're supposed to avoid the spotlight…after all, it's about the team, not the individual."

[26] The Government thus obviously frivolously argues in its "petition" that Lt. Choi knew before trial everything he needed to know to assert a selective (vindictive)-prosecution defense. See "Petition" at 28. Knowing that a legal defense is indicated in a case is different than knowing of specific evidence sufficient to get discovery on such a defense in a case, and Lt. Choi did not know of these admissions prior to trial and the Government does not suggest so.

prosecution, a defendant must initially overcome the legal hurdle of establishing 'a prima facie case based on facts sufficient to raise a reasonable doubt as to the prosecution's purpose.'") (citations and internal quotation marks omitted).

Further, it was only after the new evidence came out and after Lt. Choi and Cpt. Pietrangelo testified in main for the Defense that Judge Facciola himself first recognized the extent and nature or exact species of the Government's selective/vindictive prosecution. See The Honorable John M. Facciola, 8/31/11 p.m. at p. 10. While itself admitting this, the Government nonetheless faults Judge Facciola for his then-recognition and effectively argues that Judge Facciola should have been omniscient or prescient or simply smarter. See "Petition" at 27. But the Government is too presumptious of, and too disrespectful to, Judge Facciola. The stupidity was on the part of the Government, not Judge Facciola who presided over the case with exceptional grace and wisdom. As the Government refuses to understand, a judge simply has the discretion and right to *be the judge* in the case. As much as AUSA George and Det. Sgt. Hodge want to be judge, jury, and executioner of Lt. Choi, Judge Facciola is the judge in this case, and could reach a deliberate conclusion based on the evidence when he felt appropriate. He also could not just ignore what the evidence showed.

The Government nonetheless makes several (further) arguments against the propriety of Judge Facciola's decision, and these arguments are meritless if not frivolous as well. First, the Government argues that Lt. Choi waived the right to pursue a selective (vindictive)-prosecution defense at trial because "previous defense counsel asserted that 'Choi deliberately did not file any pretrial motions in this matter.'" "Petition" at 28 fn 12; see, also, at 10 ("Mr. Lynn, on behalf of Mr. Choi, responded that Mr. Choi deliberately did not file any pretrial motions in this matter' (App. D)."). But, in fact, Lt. Choi did file a pretrial motion if only orally. On August 25, 2011,

his current-lead-counsel, Robert J. Feldman, made a request on his behalf to Judge Facciola to take judicial notice of the photographs for a selective-prosecution defense. And to the degree that Lt. Choi did not make any formal motion regarding the selective (vindictive)-prosecution-defense issue—besides orally raising the issue through counsel as discussed above at the March 18, 2011 arraignment and thereafter—he did so because he was simply not required to, because, again, Judge Facciola had specifically deferred the issue to trial and not set a pretrial-motion deadline.

Next, the Government argues that legally there was not or could not have been any selective/vindictive-prosecution in AUSA George's charging Lt. Choi with a federal crime after the November 15, 2010 arrest versus the municipal traffic-violation Lt. Choi was charged with after the two previous arrests (March 18, 2010 and April 20, 2010) because AUSA George was fully "within the broad discretion afforded the prosecutor to bring any charges for which probable cause exists against a person who has three times in nine months engaged in the same illegal conduct." "Petition" at 4; see, also, at 1 ("Despite the fact that this was defendant Choi's third arrest in nine months for failing to obey a lawful order . . . ."). But none of Lt. Choi's actions during any of the three protests in front of the White House were illegal, and he did not disobey any lawful order during any of the three protests, and no court has ever found so. Lt. Choi's actions were protected speech. In fact, the Government had to at trial drop its municipal charges for the first two arrests because of this lack of any crime. See D.C. Superior Court Criminal Case Nos. 2010 CDC 004862, 2010 CDC 006977. And during the trial before Judge Facciola in the instant case, no evidence was presented that Lt. Choi's actions were illegal—in fact, quite the contrary. All of the evidence showed that Lt. Choi was peaceful and lawful.

And that is the very crux of the selective/vindictive prosecution here. The Government could not legally "get" Lt. Choi and thus stop his increasingly-effective embarrassment of President Obama and his Government, and so the Government tried to "get" him illegally, by hanging a baseless federal charge over his head in a high-stakes game of "chicken"—thinking Lt. Choi would have to crack under the pressure and stop his White House protests. And just to heighten the pressure, the Government also held Lt. Choi's fellow twelve arrestees "hostage." It charged them—most of whom had never been arrested before in D.C.—with a federal crime as well—even though normally White House protestors are charged with a municipal traffic-violation of failure to obey—and then required all thirteen arrestees—Lt. Choi and the twelve others—to agree to a "wired" plea in order for anyone of them to get that plea. Not coincidentally, this "wired" plea required all the defendants to not get arrested *at the White House* again. So that this last point is not lost, even though AUSA George eventually agreed to let the twelve defendants besides Lt. Choi have a plea deal despite Lt. Choi opting for trial, AUSA George originally said that all defendants had to accept the plea for anyone of them to.

Indeed, what happened with regard to the "wired" plea offer itself squarely demonstrates vindictive prosecution in the traditional sense in this case. Lt. Choi was punished for exercising his right to go to trial. AUSA George did not simply offer each defendant an individual plea, which would presumably have been benign enough. Nor did she offer all defendants a "wired" plea and then, when one defendant "broke" the "wire" by refusing the plea, take all the defendants to trial—which, again, would have been uniform in its treatment. Instead, AUSA George—contrary to her word—maintained the original charge only against the sole person who decided to go to trial—Lt. Choi. It was only on the eve of trial—after Lt. Choi had had the federal charge hanging over his head for nine months and had had to go to the time, effort, and

expense of assembling a defense team and readying a defense—that AUSA George offered a plea deal[27] again to Lt. Choi—but then it was only because *she* did not want to go to the effort of trial or to face Lt. Choi's defense at trial. It is damningly telling that in describing the plea offer in its "petition," see "Petition" at 1-2, 9-10, the Government never bothered to mention to the Court these highly important facts about the plea.

The Government also repeatedly mischaracterizes the nature of the selective-prosecution defense at issue in this case to begin with, in order to reach its self-serving conclusion that Lt. Choi did not make out a *prima facie* case of same at trial. The Government states that "the defendant's selective-prosecution claim . . . is not based on race, but on a claim 'that other protestors on the White House sidewalk, similarly situated, have been disparately treated.'" "Petition" at 25 fn 11. In fact, Lt. Choi's "claim" is based on "another arbitrary classification," see United States v. Mangieri, 694 F.2d 1270, 1273 (D.C. Cir.1982), *i.e.*, his protected speech if not sexual orientation. That the Osama bin Laden-death revelers, similarly situated, were treated differently by the Government than Lt. Choi, clearly goes to the selective-prosecution defense, *i.e.,* the element of being singled out, but the revelers are not the entire relevant group with respect to that element. The relevant group includes all who either attached themselves to the White House fence (what Lt. Choi did) (including Lt. Choi on previous occasions) or violated the White House sidewalk regulations (what the Government baselessly accused Lt. Choi of doing but he did not do) who were not equivalently critical of President Obama and his Government and who were not charged with a federal crime. Indeed, besides the case of Lt.

[27] The Government touts the fact that the eve-of-trial plea offer was better than that ultimately given to the twelve other defendants, but this fact is unavailing to the Government given the circumstances under which the better offer was made, as just discussed. The Government clearly gave the better offer in a desperate bid to avoid being found out in its persecution of Lt. Choi at trial which is exactly what happened.

Choi (and those with him), there have in recent history only two or three cases of people affixing themselves to the White House fence—as Lt. LaChance testified—and the Park Police charged all of them municipally with failure to obey. None of them were ostensibly Gay like Lt. Choi is, and none of them criticized President Obama like Lt. Choi did. The Park Police did not charge them federally even though, unlike Lt. Choi, they were on the sidewalk, and in the case of one, poured a gooey substance over herself that coated the fence, fence masonry-base, and the sidewalk.

The Government also unnecessarily focuses on the fact that the Osama bin Laden-death revelers did not handcuff themselves to the White House fence like Lt. Choi did. Lt. Choi's handcuffing was not illegal,[28] and Lt. Choi was not charged for handcuffing himself to the White House fence but for allegedly failing to obey an order to leave the "sidewalk" for being in violation of sidewalk regulations. The operative similarity is that the revelers did exactly what the Government baselessly accused Lt. Choi of doing—violate the sidewalk regulations—and yet, as the judicially-noticed photographs and Lt. Chance's testimony showed and further evidence would show, the Government neither ordered the revelers to leave the sidewalk nor arrested them for violating the regulations, much less did they charge them with a federal crime. Furthermore, the revelers in fact did the equivalent of handcuffing themselves to the White House fence—and worse.

As mentioned above, the photographs of which Judge Facciola took judicial notice showed revelers plastered against the entire White House fence, and on the White House fence

[28] The handcuffing did no damage to the White House fence, and the Government has not alleged nor proven any damage. There is no law expressly forbidding handcuffing to the White House fence. And, according to the Government itself, Lt. Choi was not disorderly. See 3/18/11 Tr. at 21. Lt. Choi *was* stationary on the fence masonry-base and there *is* a regulation forbidding stationary protests, but only on the sidewalk, not the masonry-base. The handcuffs were simply lawful props that symbolized the second-class citizenship of Gay Americans.

masonry-base, and hanging off of the fence, and raising banners and signs in front of the fence—all contrary to the regulations. Other revelers climbed up and hung off the lamp post and trees on the White House sidewalk—all against the law. None of them were arrested, though. There was one other important difference between Lt. Choi and the revelers: while Lt. Choi criticized and embarrassed President Obama and his Government for their discrimination against Gay people, the revelers praised President Obama and his Government for killing bin Laden. As the photographs demonstrate, one protestor had an Obama campaign sign, and another had a cardboard figure of President Obama smiling.

Even as to his twelve fellow November 15, 2010 protestors who were arrested, Lt. Choi was singled out because of his personal strident criticism of President Obama, his trademark but lawful use of his uniform in the protest, his leadership role in the DADT protests, and his ever-increasing national/international impact as a Gay-civil-rights leader. As the video shows, the Park Police officers, unlike with any of the other twelve arrestees, *swarmed* Lt. Choi when they arrested him and used excessive force on him in arresting him, to deliberately cause him pain and suffering. One of those officers handling Lt. Choi thusly was Det. Sgt. Hodge, the same Hodge who appears everywhere in this sordid tale. He clearly is obsessed with harming and punishing Lt. Choi for what Det. Sgt. Hodge believes is a holy sin under the Marine Corps bible: Gays daring to be in uniform, and Gays daring in uniform to demand the right to be in uniform.

The Government also incorrectly argues that there was no vindictive prosecution of Lt. Choi for his November 15, 2010 protest because Lt. Choi's November 15, 2010 protest was a carbon-copy of his earlier March 18, 2010 and April 20, 2010 protests, and he was charged for those two with a municipal traffic-violation not a federal crime and by the D.C. Attorney General's Office not the U.S. Attorney's Office. See "Petition" at 4 and 4 fn 3. Although all

three protests were certainly against DADT, they were in fact far from carbon-copies. The November 15, 2010 protest was strident in nature and literally spoke directly to President Obama in its criticism, see Govt. Ex. # 2 (Lt. Choi and 12 fellow protestors handcuffed to fence turning around and speaking to White House where President Obama was apparently in residence), whereas the previous two protests were stoic in nature and spoke only in the abstract of President Obama if at all. More importantly, Lt. Choi—after the first two protests and their international exposure—was at the zenith in the arc of his DADT protesting, and simultaneously President Obama was at the nadir of his DADT political posturing—having been roundly criticized by even his own political base, including his fervent Gay Democratic supporters, for not moving on DADT repeal. Critically—and most damagingly for President Obama—Lt. Choi's third protest was also showing the powerful "lunch-counter effect."

The famous lunch-counter sit-in protests by Blacks against segregation in the 1960s were so dramatic in part because they built up in momentum and inspired ever greater participation by their success. On the first day of the Greensboro sit-ins, four (4) students participated. On another day, thirty-one (31). On another day, three hundred (300). On yet another day, fourteen hundred (1,400). At the first White House DADT protest, it was just Lt. Choi, and Cpt. Pietrangelo, whom Lt. Choi had asked to join him. At the second protest, it was Lt. Choi, Cpt. Pietrangelo, and four other former servicemembers whom Lt. Choi had inspired to join him. At the third protest, it was Lt. Choi and twelve[29] others whom Lt. Choi had inspired to join him, and those twelve others included both former servicemembers *and* civilians, including a priest. Lt.

[29] While these successive numbers at first blush seem insignificant in comparison, they still represent an exponential progression, and it must be realized that a handful of citizens standing against the might of the "most powerful man in the world" on his "door step" is a task that is in many ways more daunting than remaining at a local lunch-counter—which is not to understate in any way the tremendous courage and effectiveness of the lunch-counter protestors, who certainly faced and suffered segregationist violence during the sit-ins.

Choi was building momentum and it began to strikingly show the third time. The reminiscence of Lt. Choi's tactics with the Black sit-ins increased the embarrassment of the first Black President for enforcing discriminatory DADT. That the building momentum incorporating wider and wider segments of American society—and the conspicuous sit-in association—alarmed and offended the White House and the Government is demonstrated by among others the fact that the Park Police repeatedly and for no legitimate reason zoomed the police camera in on Father Farrow's face, as if to punish him for supporting the protest.

And the fact that the D.C. Attorney General's Office prosecuted Lt. Choi's first two arrests whereas the U.S. Attorney's Office prosecuted the third tends to *prove* selective/vindictive prosecution—not dispel it.[30] In all three times, the *Park Police* made the arrest *and* determined the level of charge by filling out the arrest ticket. See 3/18/11 a.m. Tr. at p. 19; 8/29/11 p.m. Tr. at pp. 57, 93. The first two arrests, the Park Police indicated a municipal charge on the ticket. The third arrest, the Park Police indicated a federal charge, which AUSA George then pursued. Because Lt. Choi did the basic same physical[31] thing each protest—peacefully and lawfully handcuffing himself to the fence—and he had not been convicted on any charge from his previous arrests and in fact those charges had long since been dismissed—an impermissible motive on the Government's part must be inferred.

Finally, the Government argues that the actual defense which Judge Facciola decided at trial to let Lt. Choi pursue was vindictive prosecution, not selective prosecution, see "Petition" at 3, and that Judge Facciola improperly did so *sua sponte*, *id.* at 12. These arguments are without merit as well. Selective prosecution and vindictive prosecution are closely related, and can be

[30] Note that there is some jurisdictional overlap or control between the two, as D.C. is not a sovereign state.
[31] Although with the differences discussed above.

present together in the same case. Selective prosecution can also be termed vindictive prosecution if the arbitrary classification "selected" includes speech, *i.e.*, the different treatment from those similarly situated was based on or in retaliation for speech. Although the trial evidence—particularly the evidence showing that the orders were for Lt. Choi to leave the "sidewalk" and Lt. Choi was not on the sidewalk and yet the Government charged Lt. Choi federally for failing to obey an order anyway—clearly showed vindictive prosecution in the traditional sense, Judge Facciola simply found—after hearing the evidence—that there was a *prima facie* case that the Government had violated both Lt. Choi's Fifth and First Amendment rights. The unique "hybrid" nature of the defense—that is, both selective prosecution and vindictive prosecution—derived from the fact that the Government decided to charge Lt. Choi *before* he had even been arrested—when normally charges follow the alleged crime and following arrest. Moreover, Judge Facciola could make such a finding *sua sponte*. See United States v. Jones, *supra*. Furthermore, the Defense itself not only clearly pursued that finding on its own, including by its corresponding interrogation of witnesses along that line, see 8/29-30/11 Transcripts *passim*; 8/29/11 p.m. Tr. at pp. 32, 57-58, 69, but the Defense specifically raised that finding including in its oral motion to compel to Judge Facciola and before, see 8/31/11 a.m. Tr. at p. 72.

In sum, Judge Facciola was simply fully within his discretion in deciding to let Lt. Choi pursue a selective/vindictive-prosecution defense at trial or mid-trial, and mandamus is not appropriate.

c. The Equities Weigh Against Issuance of Mandamus

Finally, even if the Government found a "genie's bottle" and was able to "wish away" the lack of jurisdiction for and elements of mandamus, fairness and justice would compel this Court

in its discretion to still deny the Government's petition. See In re Cheney, 406 F.3d at 729 ("whether mandamus relief should issue is discretionary"). In particular, the Government has "dirty hands" in this case. See United States ex rel. Turner v. Fisher, 222 U.S. 204, 209 (1911) ("[M]andamus is not a writ of right. It issues to remedy a wrong, not to promote one, and will not be granted in aid of those who do not come into court with clean hands."). Even putting aside the Government's obvious and outrageous persecution of Lt. Choi in this case, the Government failed to timely object to Judge Facciola's deferring the selective-prosecution issue to trial, waiting until the eleventh hour on the day before trial to file their motion in limine asking him to reverse that decision. The Government should not now be heard to complain that such deferral was erroneous.

Also, the Government obviously deliberately withheld relevant (if not exculpatory Brady material) in discovery from Lt. Choi, even though he requested it. On May 2, 2011, Lt. Choi's then-counsel, Anne Wilcox, sent a standard discovery request to AUSA George, including for Jencks material. That request asked for, among other things, "all police documents," all Jencks material, "all other documentary . . . evidence to be used at trial," and "all products or fruits of government surveillance, including . . . all other results of government surveillance of co-defendants or related activities." The Secret Service email and the Myers memo and email certainly fell within one or more of these categories, especially since the Government could only have known beforehand of Lt. Choi's November 15, 2010 protest from doing illegal surveillance on him. Yet the Government never produced pretrial any of the material in its possession regarding the pre-November 15, 2010-arrest communications that came out at trial. Moreover, the Government waited until August 27, 2011, to produce other evidence including Jencks material, four months after Lt. Choi requested it. That obviously did not allow Lt. Choi's defense

team sufficient time to review that evidence and respond to it. Mandamus is not deserved by someone (the Government) who has so fundamentally played dirty.

CONCLUSION

For all of these reasons, Lt. Choi asks this Court to dismiss and/or deny the Government's "petition."

Respectfully submitted,

_____//SIGNED//_____
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CERTIFICATE OF SERVICE

I hereby certify that I have caused a copy of the foregoing Response to be served by electronic means, on this 20th day of September 2011, through the Court's CM/ECF system, upon AUSA Angela George, U.S. Attorney's Office for the District of Columbia, 555 4th St., NW, Rm. 4444, Washington, D.C., 20530.

_____//SIGNED//_____
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